THE INDIAN PARTNERSHIP ACT

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PREFACE

In this text-book an attempt has been made to explain various provisions of the Indian Partnership Act in a simple language. Up-to-date case law has been discussed to explain various principles.

The book is a section-wise commentary. So that the readers can have an idea of correllation between various provisions in any topic and also have a complete picture of the whole Chapter at a glance, "Introduction" to each Chapter has been given in the beginning of the Chapter.

I express my thanks to the publishers for their kind co-operation and preparing the Index and Table of Cases.

Any suggestions for the improvement of the book will be welcomed.

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THE INDIAN PARTNERSHIP ACT

(Act IX Of 1932)

(Received the assent of the Governor-General on the 8th April, 1932.)

An Act to define and amend the law relating to partnership.

Whereas it is expedient to define and amend the law relating to partnership ; It is hereby enacted as follows :—

CHAPTER I

Preliminary

1. Short title, extent and commencement.—(1) This Act may be called the Indian Partnership Act, 1932.

(2) It extends to the whole of India except the State of Jammu and Kashmir.

(3) It shall come into force on the 1st day of October, 1932, except section 69, which shall come into force on the 1st day of October 1933.

Comments

Before the Indian Partnership Act, 1932, the law relating to partnership was contained in Chapter XI of the Indian Contract Act. This Act is not exhaustive. The Act purports to define and amend the law relating to partnership. The unrepealed provisions of the Indian Contract Act, except when they are inconsistent with the express provisions of the Partnership Act, still continue to apply to partnership firms.[1] Since partnership arises from a contract, the principles of the law of contract obviously apply to such a contract. It has also been expressly mentioned[2] that "nothing in this Act or any repeal effected thereby shall affect or be deemed to affect any rule of law not inconsistent with this Act."

2. Definitions.—In this Act, unless there is anything repugnant in the subject or context :

(a) an "act of a firm" means any act or omission by all the partners, or by any partner or agent of the firm which gives rise to a right enforceable by or against the firm ;

(b) "business" includes every trade, occupation and profession ;

1. S. 3.
2. S. 74 (f).

(c) "prescribed" means prescribed by rules made under this Act ;

(d) "third party" used in relation to a firm or to a partner therein means any person who is not a partner in the firm ; and

(e) expressions used but not defined in this Act and defined in the Indian Contract Act, 1872 shall have the meanings assigned to them in that Act.

Comments

"**Act of a firm**".— means any act or omission which gives rise to a right enforceable by or against the firm. Such act or omission may be by :

(i) all the partners, or

(ii) any partner, or

(iii) any agent of the firm.

An act of the firm, therefore, includes such act or ommision which gives rise to a right of action either in favour of the firm against a third party or in favour of a third party against the firm. It, therefore, means that if by any act or omission legal obligations between the firm and any third party are created that would be an act of the firm. Since a firm is bound by what may be done by all the partners, or by any partner acting on behalf of the firm or by an agent of the firm, any act or omission by such persons is an act of the firm. For example, one of the partners borrows money on behalf of the firm, or an agent purchases goods for the firm, or the firm sells goods to a third party, each one of these transactions is an act of the firm. An act of the firm not only includes any contract or other transaction which creates a right enforceable but also a wrongful act as well. For example, when one of the partners commits a tort against a third party,[3] or an agent commits a fraud[4] the firm can be made liable for the same. Some of the sections in which the term has been used are 25, 28 (2), 30 (7) and (8), 31 (2), 32 (2) & (3), 34 (2), 35 and 45 (1). Every partner is liable jointly with all the other partners and also severally, for all acts of the firm done while he is a partner.[5]

"**Business**".—According to the definition given in the Act it "includes every trade, occupation or profession". Carrying on of the business is one of the essentials of partnership. The term has been used in a very wide sense to cover all sorts of enterprises. It would include any activity which is aimed at making profits. However, when the object is not to purchase an article with an idea of reselling it and thereby making some profit but making a

3. Hmalyn v. Houston & Co., (1903) 1 K. B. 81.
4. Lloyd v. Grace, Smith & Co. (1919) A. C. 716.
5. Sec. 25.

bulk purchase and then jointly sharing by a number of persons the purchased article itself, it is not carrying on of business.[6]

3. **Application of provisions of Act IX of 1872.**—The unrepealed provisions of the Indian Contract Act, 1872, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to firms.

Comments

Partnership comes into existence only by a specific contract for the purpose. Although the rules peculiar to this type of contract are contained in a separate enactment since 1932 but still for general principles of the law of contract provisions of Indian Contract Act, in so far as they are not inconsistent with the provisions of this Act, are still applicable. For example, for rules relating to offer and acceptance, consideration, free consent, legality of object, etc. the provisions of Indian Contract Act have to be looked into. But since, regarding the position of a minor, specific provisions have been contained in S. 30 of the Act, the position of a minor, to that extent, is governed by the Indian Partnership Act.

6. Coope v. Eyre (1788) 2 R. R. 706 : 1 Bl. H. 37 ; Gibson v. Luptoning. 297.

CHAPTER II

The Nature of Partnership

Introduction

Partnership is a form of business organisation where two or more persons join together for jointly carrying on some business. It is more advantageous than a sole trade business as more capital and more skill can be made available for the business. In a way it is better than a joint stock company because in the formation and day to day running of the company many formalities are needed whereas for the creation of partnership and running of business no formalities are needed. Any two persons by an agreement can create partnership and they can run their business the way they like.

According to Sec. 4 partnership is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all. According to this definition the following essentials are needed to create partnership :—

1. An agreement ;
2. Carrying on of business ;
3. Sharing of profits ; and
4. Mutual agency.

1. Agreement

Two or more persons can create partnership by an agreement between themselves. Such an agreement may be express or it may be implied. Those associations the basis of which is not an agreement cannot be called partnerships. Sec. 5 clearly provides that the relation of partnership arises from contract and not from status. For example, the members of a Hindu undivided family carrying on family business as such do not become partners in that business because the basis of relation between the members of a joint Hindu family is the status of the persons, i. e., a person born in the family automatically becomes a member of the family since his birth. On the other hand, to create partnership a contract between the persons joining is a must.

Minimum number of persons who can join as partners is two. The Partnership Act does not lay down any limit as to the maximum number. The Companies Act, 1956, however, provides that in a banking business the maximum number of persons who can join in partnership is 10 and for any other business the maximum number is 20. If the number excceds this limit it cannot be a legal part-

nership. If the number exceeds the abovestated limits then the persons joining have to form a company.

Since a contract is needed to create partnership all the partners must be competent to contract and, therefore, a minor cannot be a partner in partnership. Section 30 of the Act, however, permits a minor to be admitted to the benefits of partnership.

2. Carrying on business

The object of every partnership must be to carry on the business and to share its profits. Business includes every trade, occupation and profession. (This virtually means any activity which is aimed at earning profits.) If the object is to purchase goods and make profits by reselling them, this is carrying on of the business. However, if some persons join together to make bulk purchase of the article with a view to distribute such goods amongst themselves and thereby gain advantage of bulk purchase, this is not carrying on of the business (*Coope* v. *Eyre*).

3. Sharing of profits

Sharing of profits is an important essential of partnership. The associations like clubs or other societies whose object is not to make profits are not partnerships.

At one time it was thought that any person who shares the profits of a business is a partner but in 1860 in *Cox* vs. *Hickman* the House of Lords has held that although sharing of profits is an evidence of partnership but that is not the conclusive test. There may be persons sharing the profits of a business but they may not be partners.

Sec. 6 of the Act provides that in determining whether there is partnership between persons or not, regard must be had to the real relation between the parties, as shown by all relevant facts taken together. Merely because a person is sharing the profits of a business or is getting some payment contingent upon the earning of profits or varying with the profits earned by the business, does not of itself make such a person a partner in the business. There may be sharing of profits in the following situations and yet there may be no partnership :—

(i) Money-lender sharing the profits

Sometimes, a money-lender may be paid a share of profits until the loan given by him is paid back. Such a person does not become a partner merely because of the fact that he is sharing profits. In *Cox* vs. *Hickman* the firm of Smith & Son made an arrangement with the creditors. According to this arrangement five representatives of the creditors including Cox were appointed as five trustees to manage the business of Smith & Son and to distribute the profits amongst the creditors until all the creditors were fully paid off. While the business was in the hands of the

trustees one Hickman gave some credit to the firm and one of the trustees accepted bills drawn by Hickman undertaking to pay the price of those goods. Hickman brought an action against Cox and another trustee to recover the price of the goods supplied by him. It was held that even though Cox and other trustees were to manage the business and were also interested in sharing the profits yet the business continued to belong to Smith & Son only and such trustees had not become partners in the business. The action of Hickman, therefore, failed. Similarly, in *Mollwo & Co.* v. *Court of Wards*, the creditor of a firm got control over the business of his debtor and was also to share the profits of such business until the loan had been repaid. It was held that this creditor had not become a partner in the business.

(ii) Servant or an agent sharing profits

Sometimes, a servant or agent may be paid a share of profits so that he takes more interest in the business. Such a person merely because of sharing the profits does not become a partner.

(iii) Widow or the child of the deceased partner sharing the profits

Sometimes, if in pursuance of a contract between the partners legal representatives of a deceased partner are to share the profits of the business for a certain duration on behalf of the deceased partner, such persons sharing the profits do not become partners merely because they are sharing profits (*Holme* vs. *Hammond*). There is, however, no bar to the widow or the son of a deceased partner to enter into partnership after the death of the deceased but clear agreement to that effect has got to be proved.

(iv) Seller of goodwill sharing the profits

A person who sells the goodwill of a business may be paid the consideration for the sale of goodwill out of profits from time to time. Such a person, merely because of the fact of sharing profits, does not become a partner in the business.

4. Mutual agency

According to Sec. 4 the partnership business must be carried by all or any of them acting for all. This shows that there has to be mutual agency between partners. It means that every partner is the agent of the firm and, therefore, every partner can bind other partners by his act. A partner occupies the position both of the principal and the agent. He is agent in so far as others are bound by his act, he is also the principal since any other partner can bind him by his act. This is known as mutual agency between the partners.

We have noted above that a money-lender sharing the profits or an agent or a servant sharing the profits of a business does not become partner in the business merely because the profits are being shared. In such cases the reason for their not being part-

ners is that there is no mutual agency between such persons sharing the profits and the others.

Partners and Firm

Persons who have entered into partnership with one another are individually called partners and collectively a firm. A firm merely means all the partners joined together. In the eyes of law a firm is not a distinct legal person as a company is. A company is a separate legal entity different from its members but a partnership firm means only all the partners put together. In commercial world, however, the things are looked at from a different angle. In the books of accounts a partner may be shown as a creditor of the firm as regards the capital invested by him or he may be shown as debtor of the firm for what he may take out from the firm.

Distinction between Partnership and Joint Family

(1) The basis of partnership is a contract between persons whereas persons become members of a joint Hindu family because of their status *i. e.*, by their being born in a particular family.

(2) There is mutual agency between various partners but there is no such mutual agency between the members of a joint Hindu family. Karta has all the powers and is the only representative of the family.

(3) The liability of the partners is joint and several and is also unlimited but in case of coparceners their liability is only to the extent of their share in the family business.

(4) A partnership is dissolved by the death of a partner but that is not so in the case of joint Hindu family.

Distinction between Partnership and a Company

(1) A company is a separate legal entity different from its members but a partnership firm means all the partners of the firm put together.

(2) The minimum number of members in partnership is two and maximum in case of partnership carrying on banking business is 10 and in case of any other business is 20. In the case of a private company the minimum number is 2 and the maximum is 50 whereas in the case of a public company the minimum number of members shou'd be 7, but there is no limit to the maximum and, therefore, any number of members can hold shares in a public company.

(3) The liability of the members of a company is limited but the liability of the partners is unlimited.

(4) The shareholder of a company can transfer his share to anybody he likes but a partner cannot substitute another person in his place unless all the other partners agree to the same.

Partnership for a fixed term and Partnership at will

When the partners decide about the duration for which they have become partners it is known as partnership for a fixed term. Persons may also become partners for any particular adventure or a particular undertaking. For example, a number of persons join together to work a coal mine or to produce a film. The partnership in such a case continues until the adventure is completed or the undertaking continues. Such a partnership, according to Sec. 8, is known as particular partnership.

Where no provision is made by contract between the partners as regards the duration of partnership, according to Sec. 7, such a partnership is known as partnership at will. If the partnership is at will, any partner who wants to retire can do so by giving a notice in writing to all the other partners of his intention to retire. Similarly, in a partnership at will any partner interested in the dissolution of the firm can get the firm dissolved by giving a notice in writing to all the other partners of his intention to dissolve the firm.

4. Definition of partnership.—"Partnership" is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all.

"**Partner**", "**firm**" and '**firm name**".—Persons who have entered into Partnership with one another are called individually "partners" and collectively "a firm" and the name under which their business is carried on is called the "firm name".

Comments

Definition of Partnership

Sec. 239, Indian Contract Act, defined partnership as follows:

" 'Partnership' is the relation which subsists between persons who have agreed to combine their property, labour or skill in some business, and to share the profits thereof between them."

The present section, which replaces sec. 239, Indian Contract Act, gives a wider definition than that provided earlier. It includes the important element of 'mutual agency' which was absent in the old definition.

According to Pollock "Partnership is the relation which subsists between persons who have agreed to share the profits of a business carried on by all or any of them on behalf of all of them."

The present Act adopts Pollock's definition with slight variation. Our definition omits the words 'which subsists' out of Pollock's definition, those words being considered as unnecessary.

Moreover, instead of the words 'all or any of them on behalf of all of them' the words 'all or any of them acting for all' have been used. These words convey the idea of mutual agency which is essential for every contract of partnership.

Section 4 requires the presence of the following essentials to constitute partnership.

1. An agreement,
2. Carrying on of business,
3. Sharing of profits, and
4. Mutual Agency.

When all the above four elements are present in a certain relationship that is known as partnership. The elements are discussed below in detail.

1. An agreement. Partnership arises by an *agreement* between two or more persons to constitute partnership. Agreement here means a contract. Such an agreement may be express or implied, but the agreement, has to be there. If the basis of the relationship between certain persons is not an agreement the association would not be a partnership. Some associations may be created without an agreement e. g., the association between certain persons may arise from status as in the case of members of a Joint Hindu Family. Similarly two or more persons could become joint owners of some property by operation of law, for example, on the death of a father, two sons jointly inherit his business. The members of the Joint Hindu Family or the joint heirs in the above illustration cannot be called partners, the main reason being that their association is not the result of an agreement between those persons. To make the things further clear section 5 expressly provides that "the relation of partnership arises from contract and not from status". Thus it is the element of agreement which distinguishes a partnership from various other relationships like members of a joint Hindu family, joint owners or joint heirs. There is, however, nothing which debars these persons, i. e., the members of Joint Hindu family, joint heirs or joint legatees from constituting a partnership. For example, if two sons inherit the business of their father, they do not *ipso facto* become partners. They have acquired joint interest in the business, they may wind up the same and share the proceeds. However, if they agree, expressly or impliedly, to jointly continue that business, they will become partners. The position was thus explained in a decision of the Andhra Pradesh High Court:

[1] Jaldu Ananthe Raghurama Arya v. Jaldu Bapanna Rao, A. I. R. 1959 A. P. 456. Also see Satteraju v. Pallamraju, A. I. R. 1919 Mad. 930; L. R. 41 Mad. 999.

"There can be no quarrel with the proposition that a co-ownership is not the same thing as partnership. The mere fact that the legatees or donees under a will or a deed *inter vivos* as the case may be, or heirs at law happen to have common interest in something which is divisible amongst them would not make them partners. But, if such persons continue the business either after the death of the testator or when the inheritance falls as the case may be it could not be postulated that there was no partnership.

They are not precluded from carrying on such a business. When the business is continued, there is an implied agreement amongst the various individuals having a common interest in the business."

Similarly, after disruption of a joint Hindu family, its members may form a partnership. If such members of the family on creating partnership agree that the business would be managed by only one of them or restrictions or limitations are placed on the rights of some of the partners or they do not get the firm registered under the Partnership Act for one year that does not necessarily vitiate the partnership.[2]

Since the partnership is the result of an agreement, atleast two persons are necessary to constitute a partnership. The Partnership Act does not mention any maximum limit as regards the mumber of persons who can be partners in a partnership firm. The maximum limit has, however, been fixed by The Companies Act, 1956. According to section 11 of that Act (the maximum number of persons who can carry on Banking business in partnership is 10 and for any business other than Banking the maximum number of partners can be 20. If the number exceeds this limit the partnership becomes illegal. If more than 10 persons want to carry on a Banking business, or more than 20 persons want to carry on any other business they must do so by forming a company.

A partnership is a relationship between two or more persons arising out of contract between them.

Only those persons can be partners who are competent to contract. A minor being incompetent to contract cannot become a partner. The Act, however, permits a minor to be admitted to the benfits of the firm.[3]

Partnership can arise between "persons". A partnership firm is not a legal person and, therefore, "a firm as such is not entitled to enter into partnership with another firm or individual."[4] The

2. Murlidhar Kishangopal v. The Commissioner of Income-tax M. P. A.I.R. 1964 M. P. 224; Also see Steel Brothers & Co. v. Commissioner of Income-tax, A. I. R 1958 S C. 315.

3. For further details regarding the minor's position see notes on section 30.

4. Dulichand v. Commissioner of Income-tax, Nagpur, A. I. R. 1956 S.C. 354, at p. 358.

partners of firm can, however, enter into partnership in their *individual capacity* with another individual.[5]

The partnership arises between two or more *persons*. Persons may be natural or artificial. Thus there could be a partnership between a number of companies.[6] In *Ganga Metal Refining Company* v. *Commissioner of Income-tax, West Bengal*[7] the Calcutta High Court has expressed the view that though there is a possibility of an incorporated company forming partnership with another incorporated company in the loose sense of the term for the purpose of Income-tax, the regular concept of partnership cannot really be applied to say that an incorporated company under the Companies Act can enter into partnership with another incorporated company in the regular and technical sense.[8] P. B. Mukharji J., during the course of his judgment (at p. 434) stated that "Notionally and juristically if two incorporated companies under the Indian Companies Act enter into a partnership, then each company becomes the agent for the other and agrees to share the profits. This will create many problems for the two incorporated companies. The two companies will have to be, therefore, agents for each other in a manner which may not be permissible at all by their own charters articles and memorandum. It would be difficult to apply the very specific rights and obligations as between partners in the case of Companies as partners such as in Chapter III (Sections 9 to 17), Chap. IV (Sections 18 to 30), and Chap. VI (Sections 39 to 55), of the Partnership Act. Then there is need also for the registration of the firms and the companies as such partners in a partnership will have therefore, to, obey two masters, the Registrar of firms and Registrar of Companies. The access of each partner to the other partner's books of accounts will mean that one incorporated company would be entitled to get into the fields of accounts of the other incorporated company which is its partner. This will make nonsense of the Companies Act. Strangers then will have access to the books, accounts and papers of the companies whereas under the Companies Act, they are only limited to their own members and shareholders."

Partnership between a trust, represented by three persons, and an individual has been held to be valid.[9]

2. **Carrying on of business.**—The relationship between persons would be known as partnership when the object of their association was to carry on some business and to share its profits.

5. Commissioner of Income-tax, Bombay v. Jadavji Narsidas & Co., A. I. R. 1963 S. C 1497.

6. Steel Brothers and Co., Ltd. v. Commissioner of Income-tax, A. I. R. 1958 S. C. 315.

7. A I. R. 1967 Cal. 429.

8. Ibid., at p. 434.

9. Commissioner of Income-tax, West Bengal v. Juggilal Kamalapat, A. I. R. 1967 S. C 401. It has been held in Hossen Kasam v. Commissioner of Income-tax, (1941) Cal. W. N. 629 that since wakf is not a legal person, a partnership between a wakf and an individual is not vaild.

It may be any business which is not unlawful. The Act defines business as including "every trade, occupation or profession"[10] The definition is not exhaustive and is capable of including any kind of commercial activity. Purchasing goods with a view to make profits after selling them is a business transaction. But if a number of persons join together to make a bulk purchase of certain goods and divide the very goods amongst themselves with a view to have the benefit of bulk purchase such persons cannot be called partners although each one of them stands to gain something because purchasing goods without any idea of selling them is not carrying on of business. In *Coope* v. *Eyre*[11] there was an agreement between Eyre and Co. and others that Eyre & Co. should purchase some oil and distribute the same between itself and the other persons and others would then pay for the oil to Eyre and Co. at the purchase price. The purchase was made only in the name of Eyre & Co. without any notification to the plaintiffs that any other person had any concern in it.

Eyre and Co. having failed to pay, the question arose—could other parties, who had shared the oil, be held liable ?

It was held that there was no partnership between Eyre and Co. and others who shared the oil, as the oil was not purchased for resale, and thus they were not liable.

Heath, J. observed[12] : "Eyre & Co. are the only purchasers known to the plaintiffs ; entire credit was given to them alone. Pugh, Hattersley, and Stephens, can be liable only in the event of a concealed partnership, on this principle, "that the act of one partner binds all his co-partners, on account of the communion of profit and loss." In truth they were not partners, inasmuch as they were only interested in the purchase of the commodity and not in the subsequent disposition of it."

The business in respect of which the partners agree to carry on business must not be unlawful or opposed to public policy. It has been held by the Calcutta High Court in *Mahadeodas* v. *Gherulal Parekh*[13] a partnership where the partners agree to engage in forward contracts without an intention of actual delivery but only to deal in differences, the agreement is merely wagering. Such a partnership is valid because the wagering agreements though they have been merely declared void, they are not illegal, immoral or opposed to public policy. Wagering agreements are only void and not forbidden by law. A partnership agreement would be void if the business is forbidden by law, immoral or opposed to public policy within the meaning of section 23 of the Contract Act. Thus, where a partnership between two persons to

10. Sec. 2 (b).
11. (1788) 1 H. Bl. 37 ; 2 R. R. 706.
12. 2 R. R. at p. 710.
13. A. I. R. 1958 Cal. 703.

carry on business of transport service by obtaining permit in the name of one of them only involved the contravention of the provisions of sections 42 (1) and 59 (1), Motor Vehicles Act, the partnership is illegal and opposed to public policy. A claim on the basis of the settlement of accounts of such a partnership is also illegal and the same, therefore cannot be enforced.[14]

(It is further necessary that the business must be *carried on* by all the partners or any one of them acting for all of them. Carrying on of a business involves a series of transactions. Merely a single isolated transaction of purchase and sale by a number of persons does not mean carrying on of the business. For example, A and B jointly purchase a building for a sum of Rs. 10,000 and after sometime they sell the building for Rs. 20,000 and share the gain of Rs. 10,000 equally. This transaction is not the carrying on of the business between A and B and, therefore, they are not partners. There is, however, possibility that the partners may engage in a single adventure or a single undertaking and that may involve the carrying on of a business.) According to section 8 there can be "Particular partnership" between partners whereby they engage in particular adventures or undertakings. (Thus, persons can be partners in the working out of a coal-mine or the production of a film because although that may be a single adventure but the same requires a series of transactions and continuing relationship. Similary, if a number of bales of yarn are purchased at one time, but the sales are to go on, profits are to be realised and then distributed amongst a number of persons, there is a carrying on of business.[15]) The effect of distinction between a single transaction (also sometimes mentioned as single venture) and the carrying on of the business has been stated as follows.[16]

"A single venture or transaction finishes immediately after the purchase and the sale. There is no continuity or carrying on of the business", in the sense that one or more partners continue to have the responsibility and to apply their discretion, in buying, storing, selling and keeping charge of the moneys over a length of period. If this length of period, and the scope of the business are defined with reference to a particular season or to particular quantities of commodity, then we have a particular partnership. If in the agreement itself the period and the scope are not precisely defined, then we may call it a general partnership. Either way, it has to be a business, "carried on" with repetitions of the pro-

14. A. V. Varadarajulu Naidu v. K. V. Thavasi Nadar, A. I. R. 1963 Mad. 413 ; Velu Padayachi v. Siva.ooriam Pillai, A. I. R. 1950 Mad. 444 : I. L. R. (1950) Mad. 987 ; Maniam Hiria Gowder v. Naga Maistry, A. I. R. 1957 Mad. 620 : (1957) 2 Mad. L. J. 264 ; Visivanatha v. Namakchand Gupta, (1954) 2 Mad. L. J. 782 ; Kanniappa Nadar v. Karuppiah Nadar, A. I. R. 1962 Mad. 240 : I. L. R. (1962) Mad. 441.

15. Senaji Kapurchand v. Pannaji Devichand, A. I. R. 1930 P. C. 300 ; Nathi Lala v. Sri Mal, A. I. R. 1940 All. 230.

16. Ram Dass v. Mukut Dhari, A. I. R. 1952 V. P. 1. at p. 3.

cess of purchasing and selling, and keeping charge of the commodities and the moneys."

3. **Sharing of profits.**—The object of every partnership must be to carry on business for the sake of profits and to share the same. Therefore, clubs or societies which do not aim at making profits are not partnerships. The term "profits" has not been defined in the Act. It means net gain, i. e., the excess of returns over outlay.

Although sharing of profits is one of the essential elements of every partnership but every person who shares the profits need not always be a partner. For example, I may pay a share of profits to the manager of my business instead of paying him fixed salary so that he takes more interest in the progress of the business, such person sharing the profits is simply my servant or agent but not my partner. Similarly, a share of profits may be paid by a business man to a money lender by way of payment towards the return of his loan and interest thereon, such a money-lender does not thereby become a partner. At one time it was thought that a person who shared the profits must incur the liability also as he was deemed to be a partner. This rule was laid down in *Grace* v. *Smith*[17] in 1775 and it was stated by Grey C. J. that "every man who has the share of the profits of a trade ought also to bear his share of the loss." This principle was confirmed in 1793 in *Waugh* v. *Carver*.[18] In 1860 this question came for consideration before the House of Lords in *Cox* v. *Hickman*.[19] In that case it was laid down that the persons sharing the profits of a business do not always incur the liability of partner unless the real relation between them is that of partners.

The facts of *Cox* v. *Hickman* are as under :

Smith and his son carried on business as Smith & Son. They got into financial difficulties as a consequence of which they executed a deed of arrangement with the creditors. According to the arrangement five representatives of the creditors were appointed as five trustees. They included Cox and Wheatcroft. The business of Smith and Son was to be managed by the five trustees. The net income of the business was to be distributed by these trustees amongst the general creditors of Smith & Son. After all the creditors had been paid off the business was to be returned to Smith & Son. While the business was being managed by the trustees, the plaintiff, Hickman, supplied goods to the firm. One of the trustees accepted bills of exchange drawn by Hickman undertaking to pay the price of those goods. Hickman sued Cox and Wheatcrof to recover the price of the goods supplied by him.

The House of Lords held that although Cox and Wheatcroft

17. (1775) 2 Wm. Blacks, 998.
18. (1793) 2 H. Blacks. 235 : Smith's L. C.
19. (1860) 8 H. L. C. 268 : 125 R. R. 148.

the real relation between the persons thus sharing the profits may not be that of partners.

Money-lender sharing the profits.

At one time it was thought that a person sharing the profits must also incur the liability of a partner.[22] In 1860 the House of Lords in *Cox* v. *Hickman*[23] laid down that it would not be correct to infer partnership from the mere fact that certain persons are sharing profits. It has to be seen as to why a person is sharing profits and what is the real relationship between the persons sharing the profits. In *Cox* v. *Hickman* the firm of Smith & Son got into financial difficulties. They executed a deed of arrangement with their creditors. According to this arrangement five representatives of the creditors, known as the trustees, were to manage the business of Smith & Son and to apply the profits in payment of amount due to the creditors. After the creditors had been paid off the business was again to be handed over to Smith & Son. The trustees included Cox and Wheatcroft. The plaintiff, Hickman, supplied goods to the firm while the business was being managed by the trustees and one of the trustees accepted bills drawn by Hickman undertaking to pay for the goods. Hickman sued Cox and Wheatcroft to recover the price of the goods supplied by him. It was held that although the creditors were sharing the profits and the business was being managed by the trustees, still the relationship between Smith and Son on the one hand and the creditors (including trustees) on the other was that of debtor and creditor and not that of partners and, therefore, Cox and Wheatcroft could not be made liable.

In *Mollwo March & Co.* v. *Court of Wards*,[24] a Hindu Raja advanced large sums of money to a firm. The Raja was given extensive powers of control over the business and he was to get commission on profits until the repayment of his loan with 12 per-cent interest thereon. It was held that the Raja could not be made liable for the debts contracted by the firm while the said agreement was in force, because the intention in the agreement was not to create partnership but simply to provide security to Raja, who had lent money to the firm.

Servant or agent sharing the profits.

Sometimes a share in the profits may be given to a servant agent in the business so that he can take more interest in the siness. Such a person sharing the profits in that capacity does t thereby become a partner. In *McLaren* v. *Verschoyle*,[25] an sistant in a firm of brokers was paid a share in the profits over d above his salary. At times he signed some letters and docu-

22. Grace v. Smith, (1775) 2 Wm. Blacks. 998 ; Waugh v. Carver, (1793) Blacks. 235.
23. (1860) 8 H. L. C. 268 : 125 R. R. 148.
24. (1872) L. R. 4 P. C. 419.
25. (1901) 6 Cal. W. N. 429.

ments on behalf of the firm. It was held that such a servant only acted as an agent for the firm and the mere fact that he shared the profits did not make him a partner in the firm. Similarly, in *Munshi Abdul Latif* v. *Gopeswar*,[26] A, who had undertaken to load and unload railway wagons for a limited company, appointed B to do that job. B was to be paid 75 per cent of the profits and was also liable for the losses, if any. It was held that the relationship between A and B was that of principal and agent and not partners.

3. Widow or child of a deceased partner sharing profits.

Sometimes on the death of a partner the widow or the child of the deceased partner may be given a share of profits in accordance with an agreement which may have been entered into between the partners. Such widow or child does not become the partner merely because he or she is sharing the profit in the business.

In *Holme* v. *Hammond*[27], 5 persons entered into partnership for 7 years and agreed to share the profits and losses equally. They further agreed that if any one of them died before the expiry of the said period of 7 years, the others would continue the business and pay the share of the profits of the deceased to his executors. On the death of one of the partners the survivors continued the business. The executors of the deceased, who did not actually take any part in the management of the business, were paid 1/5th share of profits made since the death of the deceased. The plaintiff sued the executors of the deceased to make them liable in respect of a contract entered into by the surviving partners after the death of the deceased partner. It was held that the executors, though sharing the profits, had not become partners and, therefore, they could not be made liable.

There is no bar to the widow or the son of a deceased partner to enter into partnership after the death of the deceased, but a clear agreement to that effect has to be proved.[28]

4. Seller of goodwill sharing the profits.

A person selling the goodwill of his business may be entitled to share the profits of a business in consideration for the sale of goodwill, such a person will not become a partner merely because he is sharing the profits with the person carrying on such business. In *Pratt* v. *Strick*[29], a doctor sold the goodwill of medical practice and entered into an agreement with the buyer of the goodwill that

26. A. I. R. 1933 Cal. 204 : (1932) 56 Cal. L. J. 172.
27. L. R. 7 Ex. 218.
28. Commissioner of Income-tax v. M/s. Kedarmall V. Keshardeo, A.I.R. 1968 Assam & Nagaland 68.
29. (1932) 7 Tax Cas. 459. Rowlinson v. Clarke, 15 M. & W. 292; Hawksley v. Outram, (1892) 3 Ch. 359.

he would help such buyer to introduce patients for 3 months and he would be entitled to half the share of profits and incur half the expenses. It was held that the doctor had not become a partner with the person to whom the goodwill was sold.

7. Partnership at will.—Where no provision is made by contract between the partners for the duration of their partnership or for the determination of their partnership, the partnership is "partnership at will."

Comments

Partners are free to agree as to how long partnership between them will continue. If they decide the duration of partnership, it is known as parnership for a fixed term. This section provides that where there is no provision in the contract between the partners for the duration of their partnership, the partnership is a partnership at will. In case the partnership is at will, obviously the partners do not bind themselves to remain partners with each other for any specific period. They are in such a case, free to break their relationship at their sweet will. Sec. 32 (1) (c) provides that where the partnership is at will, a partner may retire by giving a notice in writing to all the other partners of his intention to retire. Similarly, in case of partnership at will, dissolution of the firm can be sought by any partner by giving a notice in writing to all others. Section 43 provides that where the partnership is at will, the firm may be dissolved by any partner giving notice in writing to all the other partners of his intention to dissolve the firm. The firm is dissolved as from the date mentioned in the notice as to the date of dissolution or, if no date is so mentioned, as from the date of the communication of the notice.

If the agreement contains any provision which is inconsistent with the partnership at will. e. g., retirement is not possible at the sweet will of a partner but notice of a certain duration is needed before a partner can retire, or, dissolution can be possible only under special circumstances, such a partnership is not a partnership at will.

8. Particular partnership.—A person may become a partner with another person in particular adventures or undertakings.

Comments

This section contemplates existence of partnership in respect of a particular adventure or undertaking e. g., there may be partnership for working a coalmine or producing a film. The section makes it clear that single adventure or undertaking would constitute "business" as defined in S. 2 (b) of the Act.

CHAPTER III

RELATIONS OF PARTNERS TO ONE ANOTHER

Introduction

This chapter deals with mutual relations between the partners *i. e.*, the rights and duties of the partners *inter se*. Sec. 11 (1) provides the general rule that the partners are free to regulate their mutual rights and duties by a contract between themselves. Such contract may be express or it may be implied. This rule is subject to the provision of this Act. Sections 12 to 17 in this Act lay down various rights and duties of the partners and all these provisions are subject to contract between the partners. Some duties have been mentioned in Secs. 9 and 10. These two sections are not subject to contract between the partners and, therefore, the duties mentioned therein are applicable to all partnership. The following are the rights and duties of the partners mentioned in this chapter.

Rights of the Partners

1. Right to take part in the management

According to Sec. 12 (a) every partner has a right to take part in the conduct of the business of the firm. Since the business belongs to all the partners in the firm, no partner can be debarred from taking part in the management.

2. Right to express opinion

According to Sec. 12 (e) any difference arising as to ordinary matters connected with the business may be decided by a majority of the partners. For matters of fundamental importance, for example, in case a change in the nature of business is to be made or a new partner is to be admitted, consent of all the partners is necessary. Every partner has been empowered to express his opinion before the matter is decided. Therefore, even though in ordinary matters the decision of the majority of the partners would prevail but they are bound to consult every partner before the decision is taken.

3. Right to have access to books of the firm

According to Sec. 12 (d) every partner has a right to have access to and to inspect and copy any books of the firm. This right is available to both active and dormant partners. This right is not only in respect of books of accounts but in respect of any books of the firm. The partner could exercise this right either personally or by engaging an agent for the purpose.

4. Right to share profits

The object of any partnership is to share the profits of a business. The partners are free to decide about the proportion in which they will be sharing the profits and losses. In case the partners have not made any agreement to that effect, according to Sec. 13 (b) the partners are entitled to share equally in the profits earned, and shall contribute equally to the losses sustained by the firm.

Unless otherwise agreed a partner is not entitled to receive remuneration for taking part in the conduct of the business. If any partner devotes more time in the business than others, the partners are free to agree that such a partner would be getting some additional salary, commission etc, for such work done by him.

5. Right of interest on capital and advances

Generally no interest on capital subscribed by the partner is to be given because the partners share the profits of the business of the firm. In case the partners agree that interest on capital is to be given, according to Sec. 13 (c) such interest shall be payable only out of profits.

Sometimes over and above the capital subscribed by the partners the firm may need extra money. In case a partner makes any payment or advance beyond the amount of capital he has agreed to subscribe, he is entitled to interest thereon at the rate of six per cent per annum, acccording to Sec. 13 (d).

6. Right to indemnity

A partner while acting on behalf of the firm may make certain payments and also incur some liabilities. According to Sec. 13 (e), he is entitled to claim indemnity for the same. The indemnity can be claimed for the acts done by a partner in the ordinary and proper conduct of the business and also for doing some act in an emergency for the purpose of protecting the firm from the loss.

Duties of the partners

1. Duty to carry on the business to the greatest common advantage

Partnership is based upon mutual confidence and trust. It is, therefore, necessary that no partner should gain any personal advantage at the cost of others. One of the duties mentioned in Sec. 9 is that partners must carry on the business to the greatest common advantage. This provision is to be read with Sec. 16 (a), which provides that if any partner derives any profits for himself from any transaction of the firm, or from the use of the property or business connection of the firm or the firm name, he shall account for that profit and pay it to the firm. In *Bentley* v. *Craven* one of the partners of a firm of sugar refineries was assigned the duty of purchasing sugar from the market for being refined. He,

instead of purchasing sugar from the market for the firm, supplied his own sugar which he had purchased earlier at a lower price. It was held that this partner was not entitled to keep this profit with himself.

2. Duty to be just and faithful to each other

Another duty mentioned in sec. 9 is that the partners must be just and faithful to each other. There is mutual agency between the partners and the act of one partner binds all others. It, therefore, becomes the duty of the partners that they perform their functions with utmost fairness. Sec. 33 expressly provides that while expelling a partner from the firm the other partners must exercise this power in good faith. Similarly, good faith is also needed when an active partner acts on behalf of a sleeping partner or one partner purchases the share of another partner. In case a partner betrays confidence, he is accountable for the same.

3. Duty to render true accounts and full information

It is the duty of a partner to keep and render true and complete accounts of all partnership moneys with him. Since every partner has a right to have access to the accounts of the firm, such accounts must be made available whenever so required.

Every partner is an agent of the firm. According to the law of agency information to the agent is deemed to be information to the Principal. Sec. 9 makes it incumbent on every partner to pass on full information of all things affecting the firm to his other fellow partners.

4. Duty to indemnify for fraud

A firm is liable towards the third party for any fraud or wrongful act or omission of a partner done in the ordinary course of the business of the firm. Sec. 10 provides that if a partner commits a fraud against a third party and the third party makes the firm liable for the same, the guilty partner is bound to indemnify the firm for the loss thus caused to the firm. This provision is mandatory and not subject to the contract between the partners. A partner, therefore, cannot contract himself out of the liability stated above.

5. Duty to be diligent

According to Sec. 12 (b) every partner is bound to attend diligently to his duties in the conduct of the business of the firm. Sec. 13 (f) further provides that if any loss is caused to the firm by the wilful negiect of a partner in the conduct of the business of the firm, such partner shall indemnify the firm for the loss.

6. Proper use of firm's property

According to Sec. 15 the property of the firm shall be held and used by the partners exclusively for the purpose of business

of the firm. Sec. 16 (a) provides that if a partner derives any profit for himself from any transaction of the firm or from the use of the property or business connection of the firm or the firm name, he shall account for that profit and pay it to the firm.

7. Duty not to compete

It has been provided in Sec. 11 (2) that even though according to the Indian Contract Act an agreement in restraint of trade is void, the partners are free to make a contract that a partner shall not carry on any business other than that of the firm while he is a partner. In case they agree to that effect a partner carrying on any other business can be restrained through an injunction. In case no such restriction is imposed by a contract between the partners, a partner would be free to carry on other business also than that of the firm. If the other business is of the same nature as and competing with that of the firm, according to Sec. 16 (b), a partner carrying on such a business shall account for and pay to the firm all profits made by him in that business. It obviously implies that if carrying on other business is not barred by an agreement between the partners and the other business carried by a partner is of a different nature and not competing with the firm, the partner is entitled to keep the profits of that business with himself.

There may be some changes in the firm. Sec. 17 contemplates the following three changes and provides that inspite of the changes the mutual rights and duties of the partners remain the same, unless the partners by an agreement prefer to change the same.

(i) Change in the constitution of the firm

A change in the constitution of the firm may occur either when a new partner is introduced or some partner ceases to be a partner by retirement, expulsion, insolvency or death. The mutual rights and duties of the partners continue to be the same inspite of the change.

(ii) Business carried on after the expiry of the term

In case the firm was constituted for a fixed term but the business is continued even after the expiry of the term, the mutual rights and duties of the partners will continue to be the same.

(3) Carrying out of additional undertakings

A firm may have been constituted for one or more specific adventures or undertakings. In case a firm carries out other adventures or undertakings also, the mutual rights and duties of the partners will continue to be the same.

9. General duties of partners.—Partners are bound to carry on the business of the firm to the greatest common advantage, to

be just and faithful to each other, and to render true accounts and full information of all things affecting the firm to any partner or his legal representative.

Comments

This Chapter deals with the relations of partners to one another, i. e., their mutual rights and duties. Sec. 11 (1) provides that the partners themselves may decide about their mutual rights and duties by a contract between themselves. Ss. 12 to 17 lay down rules regarding their mutual rights and duties and all these provisions are subject to contract between the partners. Ss. 9 and 10 lay down certain duties by which all the partners are bound. The duties mentioned in this section are as under :

(1) To carry on the business to the greatest common advantage ;

(2) To be just and faithful to each other ;

(3) To render true accounts ; and

(4) To render full information of all things affecting the firm.

1. Duty to carry on the business to the greatest common advantage

Every partner should act to the greatest common benefit of all the partners rather than gaining any personal advantage at the expense of others. This provision has to be read with section 16 (a) of the Act according to which if a partner derives any profit for himself from any transaction of the firm, or from the use of the property or business connection of the firm or the firm name, he shall account for that profit and pay it to the firm. Thus, if a partner makes any secret profit out of any transaction of the firm or instead of procuring a contract to the advantage of parnership firm makes the contract in his own name, or instead of selling the firm's goods to a third party purchases them at a lower price himself, or instead of purchasing goods from the market sells his own goods to the firm and thereby gains personal advantage, he cannot keep that benefit with himself. He is bound to account for that profit to the firm.

In *Bentley* v. *Craven*[1], a firm which had been established for refining sugar consisted of four parners. One of the partners, who was considered to be expert in the job, was authorised to purchase sugar for the firm for refining. Instead of purchasing sugar from the market he supplied his own sugar, which he had purchased earlier at much lower price and thus made considerable profit. He did not disclose this fact to other partners that he was making profit in this particular transaction. It was held that the firm was entitled to recover the profit thus made oy this partner.

1. (1853) 18 Beav. 75 : 104 R. R. 373.

In *Gardener* v. *McCutcheon*[3], a number of persons were the joint owners of a ship which was to be employed for their common benefit. One of them, who was the master of the ship, traded on his own account and made considerable profit. It was held that the defendant was not entitled to use the partnership property for his private benefit and, therefore, he was bound to account for that profit to the other co-partners.

2. Duty to be just and faithful to each other

Persons enter into partnership with others on the basis of their mutual confidence and trust. There is mutual agency between the partners and every partner is the agent of all others and he can bind them to an unlimited extent. Every partner is therefore, expected to be just and faithful to his co-partners. The partners must perform their functions with utmost fairness. Thus, sec. 33 provides that even if the contract between the partners authorises the expulsion of a partner, the fellow partners must exercise this power in good faith. Similarly, when a partner purchases the share of another partner or a working partner is acting on behalf of a sleeping partner, or there is a transaction in which a partner is likely to gain an advantage at the cost of others, there is a need for good faith. If a partner betrays confidence reposed in him and gains any personal advantage at the cost of other partners he is accountable for the same. In case a partner is guilty of a conduct which destroys mutual confidence, e. g., one partner commits adultery with another partner's wife, can be a ground on which the court may order dissolution of the firm.[2]

3. Duty to render true accounts

Every partner is bound to keep and render true and complete account of all the partnership moneys with him. He also must make these accounts available to the other partners because every partner has a right to have access to and to inspect any copy any of the books, including the account books of the firm[3]. The partnership funds in the hands of a partner must be spent by him properly for the purpose of the firm's business and the partner concerned should keep proper vouchers in respect of the expenses. He should not mix up his money with that of the firm nor should he wrongly spend or misappropriate the firm's money, otherwise he will be accountable for the same towards the firm.

4. Duty to render full information of all things affecting the firm

Partnership is based upon mutual confidence and trust. Utmost good faith is needed in relation between the partners. Every partner is also an agent of the firm. It is, therefore, expected that whatever information a partner obtains concerning the firm, he

2. Abbot v. Crump (1870) 5 Beng. L. R. 109.
3. Sec. 12 (d).

will not conceal it from the other copartners but will pass on that information to all the partners. If a partner having knowledge of material facts with regard to the partnership assets purchases the share of a co-partner in the firm's assets without disclosing those material facts the contract is voidable. In *Law* v. *Law*.[4] it has been held that is a partner, who is entitled to repudiate the contract on the ground of concealment of facts by the other copartner does not insist on full disclousure, but rather agrees to the modification of the original bargain, such a partner cannot subsequently repudiate the contract.

10. Duty to indemnify for loss caused by fraud.—Every partner shall indemnify the firm for any loss caused to it by his fraud in the conduct of the businss of the firm.

Comments

The firm is liable not only for the contract made by one of them on behalf of others but also for wrongful act or omission of a partner acting in the ordinary course of business of the firm. If a partner commits a fraud against a third party while acting in the ordinary course of business of the firm, the third party can make the firm liable for the same. This section entitles the firm to recover indemnity from the partner guilty of fraud because of which the firm had to suffer the loss. Unlike the provisions of sections 12 to 17, the duty mentioned in this section is not subject to the contract between the partners. It is, therefore, not possible for a partner to negative his liability towards the firm for loss caused to the firm due to his fraud. This section in absolute terms provides that every partner shall indemnify the firm for any loss caused to the firm by his fraud in the conduct of the business of the firm and leaves no scope for the guilty partner to control himself out of such liability.

11. Determination of rights and duties of partners by contract between the partners.—(1) Subject to the provisions of this Act, the matual rights and duties of the partner of a firm may be determined by contract between the partners, and such contract may be expressed or may be implied by a course of dealing.

Such contract may be varied by consent of all the partners, and such consent may be expressed or may be implied by a course of dealing.

(2) Agreement in restraint of trade.—Nothwithstanding anything contained in section 27 of the Indian Contract Act, 1872, such contracts may provide that a partner shall not carry on any business other than that of the firm while he is a partner.

Comments

This section incorporates the general principle that subject to

4. (1905) 1 Ch. 140.

the provisions of this Act the partners are free to make any agreement they like to govern their mutual rights and duties. Accordingly, the provisions of sections 12 to 17, 20 and 42 have been expressly made subject to contract between the partners. Provisions of sections 9 and 10, however, are not subject to the contract. Thus, the partners are free to decide that some of them will be getting some salary in addition to the profits. They may also decide about the proportion in which they will be sharing the profits and losses. They may also vary the contract whenever they like by their mutual consent.

Sub-sec. (2) gives the liaberty to the partners to make a contract that a partner shall not carry on any business other than that of the firm while he is a partner. Although according to sec. 27 of the Indian Contract Act agreement in restraint of trade is void, but such an agreement entered into between the partners as stated above will be valid.

12. The conduct of the business.—Subject to contract between the partners —

(a) every partner has a right to take part in the conduct of the business ;

(b) every partner is bound to attend diligently to his duties in the conduct of the business ;

(c) any difference arising as to ordinary matters connected with the business may be decided by a majority of the partners, and every partner shall have the right to express his opinion before the matter is decided, but no change may be made in the nature of the business without the consent of all the partners ; and

(d) every partner has a right to have access to and to inspect and copy any of the books of the firm.

Comments

This section mentions the following rules relating to the conduct of the business of the firm. These rules, being subject to agreement between the partners, are applicable unless they are varied or negatived by an agreement between the partners.

Sub-sec. (a)—Right to take part in the conduct of the business

Since the partnership business belongs to all the partners it has been provided that every partner has a right to take part in the conduct of the business. The partners are free to provide in their agreement that a partner may not take part in the conduct of the business. If a partner is wrongfully prevented from taking part in the conduct of the business he can seek the help of the court in exercising his right. In case the agreement permits only some of the partners to manage the business and not others, only

those so entitled will be eligible to conduct the business.

Sub-sec. (b)—Duty to be diligent

Every partner is supposed to attend to his duties diligently. If a partner is negligent in the performance of his duties this may cause loss not to that partner alone but to the whole firm. It has, therefore, been provided in sec. 13 (f) that if the firm suffers any loss by the wilful neglect of a partner he shall indemnify the firm for the same. Taking part in the conduct of the business of the firm being the duty of a partner, it has been provided in sec. 13 (a) that a partner is not entitled to receive remuneration for taking part in the conduct of the business. This is subject to contract between the partners and therefore, if the partners so desire they may decide about the remuneration to be paid to a partner.

Sub-sec. (c)—Right to express opinion

When there is difference of opinion between the partners majority of the partners cannot ignore the minority and take decisions without consulting them. The difference of opinion may be either (i) as to ordinary matters connected with the business, or (ii) matters of fundamental importance.

Clause (c) provides that any differences arising as to ordinary matters connected with the business may be decided by a majority of the partners. But before the matter is decided every partner must be provided with an opportunity to express his opinion. In this connection Lord Eldon observed,[5] "I call that the act of all, which is the act of the majority, provided all are consulted, and the majority are acting *bona fide*, meeting, not for purpose of negativing, what any one have to offer, but for the purpose of negativing, what, when they met together, they may, after due consideration think proper to negative: For a majority of the partners to say,—We do not care what one partner may say, we, being the majority, will do what we please,—is, I apprehend, what this Court will not allow." The power of the majority has to be exercised in good faith. If the majority of the partners decide to expel a partner without sufficient cause, the expulsion would be set aside.[6]

When the matter is not an ordinary or a routine matter but is of fundamental importance consent of all the partners is needed. Admission of a new partner to the firm or a change in the nature of the business are the matters of this nature. This provision being subject to contract between the partner, they may decide that in all matter it is the decision of majority which will prevail.

5. Const v. Harris (1824) T. & R. 496, at p. 525.
6. Blisset v. Daniel (1853) 10 Hare. 93: 90 R. R. 454: 68 E. R. 1022.

Sub-sec. (d)—Right of access to books

A partner is entitled to have access to the book of the firm. He is entitled to inspect and copy them. This right is available to every partner, whether active or dormant. This right could be exercised either personally or through a duly authorised agent.

13. Mutual rights and liabilities.—Subject to contract between the partners—

(a) a partner is not entitled to receive remuneration for taking part in the conduct of the business ;

(b) the partners are entitled to share equally in the profits earned, and shall contribute equally to the losses sustained by the firm ;

(c) where a partner is entitled to interest on the capital subscribed by him such interest shall be payable only out of profits ;

(d) a partner making for the purposes of the business, any payment or advance beyond the amount of capital he has agreed to subscribe, is entitled to interest thereon at the rate of six precent per annum ;

(e) the firm shall indemnify a partner in respect of payments made and liabilities incurred by him—

(i) in the ordinary and proper conduct of the business, and

(ii) in doing such act, in an emergency, for the purpose of protecting the firm from loss, as would be done by a person of ordinary prudence, in his own case, under similar circumstances ; and

(f) a partner shall indemnify the firm for any loss caused to it by his wilful neglect in the conduct of the business of the firm.

Comments

This section deals with the mutual rights, duties and obligations of the partners which are subject to contract between the partners. If the contract between the partners does not provide anything on these matters then the provisions of this section will be applicable.

Sus-sec. (a)—Right to remuneration

Every partner is bound to attend diligently to his duties in the partnership business[7] but he is not entitled to receive any remuneration for taking part in the conduct of the business. This

7. Sec. 12 (b).

being subject to contract between the partners, it may be agreed between them, that some of them will be receiving some salary or otherwise extra remuneration.

Sub-sec. (b)—Right to profits

Every partner has a right to share the profits. Generally the partners provide in their agreement as to what will be the proportion in which they will share the profits. For example, in a firm of three partners, it may be agreed that the profit sharing proportion will be 1/2 : 1/4 : 1/4. In the absence of any such agreement the partners are to share the profits equally and also to contribute equally to the losses sustained by the firm and not in the proportion in which various partners contribute capital. If any partner alleges that their shares are unequal he has to prove an agreement to that effect.

Sub-sec. (c)—Right of interest on capital

Generally a partner has no right of interest on capital subscribed by him. The partners can, however, decide that interest on capital is to be given. In such a case, unless otherwise agreed, the rule is that such interest shall be payable only out of profits. That means no interest on capital will be payable unless the firm makes profits.

Sub-sec. (d)—Right of interest on advances

Sometimes a partner may make payment or give advance to the firm over and above the capital subscribed by him. For such an advance he would get either such interest as may be agreed upon, or if there is no agreement to that effect then interest at the rate of six per cent per annum.

Sub-sec. (e)—Right to indemnity

A partner is entitled to claim indemnity from the firm in respect of payments made or liabilities incurred by him either in the ordinary and proper conduct of the business of the firm, or in doing such acts in an emergency, for the purpose of protecting the firm from loss. In order to claim indemnity for expenses and liabilities incurred during emergency it is necessary that the partner concerned must have acted in the same way as a person of ordinary prudence under similar circumstances would have acted in his own case.

Sub-sec. (f)—Liability for wilful neglect

It has already been noted that every partner is bound to attend diligently to his duties in the conduct of the business of the firm. If there is wilful neglect on the part of the partner in the performance of his duties and the firm suffers loss the partner concerned shall indemnify the firm for the loss thus caused. The partners are, however, free to make a contract that they will not

be liable for the wilful neglect because this provision is subject to the contract between the partners. The expression "wilful neglect" means an act done intentionally and deliberately rather than by inadvertence or an accident.[8] An act done in good aith and *bona fide* cannot be termed a wilful neglect. In *Cragg* v. *Ford*,[9] a partner who was made incharge for winding up the business of the firm made some delay in disposing of some bales of cotton, ignoring the suggestion of a fellow partner. The prices of cotton fell considerably and loss was caused due to the delayed sale. It was held that the defendant was not liable for the loss as there was no wilful neglect on the part of the partner concerned because he was acting *bona fide* and did not anticipate the sudden fall in the prices.

14. The property of the firm.—Subject to contract between the partners, the property of the firm includes all property and rights and interest in property originally brought into the stock of the firm, or acquired by purchase or otherwise, by or for the firm, or for the purpose and in the course of the business of the firm, and includes also the goodwill of the business.

Unless the contrary intention appears, property and rights and interests in property acquired with money belonging the firm are deemed to have been acquired for the firm.

Comments

According to sec. 15 the property of the firm is to be used by the partners exclusively for the purposes of the firm's business rather than the private and personal use of a partner. Moreover on the dissolution of a firm the property of the firm is to be applied in the payment of the debts and liabilities of the firm.[10] The partners can by an agreement decide as to what will constitute the property of the firm. Unless otherwise agreed the property of the firm will consist of what has been explained in this section.

Property of the firm not only includes what is originally brought into the stock of the firm but also whatever is subsequently acquired, by purchase or otherwise. Partners may bring in immovable property also into the common stock and that becomes the property of the firm. Even if the property contributed by one partner be an immovable property, no document, registered or otherwise, is required for transferring the property to partnership.[11]

Property of the firm also includes goodwill. It is an advantage acquired in the course of business.[12] It is acquired

8. Tamboli v. G. I. P. Rly. (1928) 52 Bom. 169 (P. C.); Govind v. Rangnath, (1930) 32 Bom. L. R. 232.
9. (1842) 1 Y. & C. Ch. Cas. 280.
10. Sec. 46.
11. Firm Ram Sahay v. Bishwanath, A. I. R. 1963 Pat. 221. at p. 223.
12. See Trego v. Hunt, (1896) A. C. 7.

by a business, beyond the mere value of the capital, stock, fund and property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers. It is an advantage which a business acquires by its reputation. A newly established business may not be able to attract many customers but when this business gets established and earns goodwill it may be able to attract more customers giving it an obvious advantage of making more profits. Goodwill being the property of the firm it may be sold either separately or along with other property of the firm.[13]

Property purchased with the partnership money is deemed to be the property of the firm. If a partner purchases some property with partnership money in his own name, it is deemed to be the partnership property being held by the partner on behalf of the firm. Thus, land purchased with the partnership money but in the name of a partner,[14] or shares purchashed by a partner with the firm's money in a partner's name,[15] or insurance policies taken on the lives of the partners the premium for which is paid by the firm, are deemed to be the property of the firm.[16]

15. Application of the property of the firm.—Subject to contract between the partners, the property of the firm shall be held and used by the partners exclusively for the purposes of the business.

Comments

The property of the firm belongs jointly to all the partners and no one can use the same for his personal advantage. Although every partner has an interest in the property but no one can deal with any specific item of property as his own. In *Addanki Narayanappa* v. *Bhakara Krishnappa*, the Supreme Court explained the nature of the rights of the partners in the following words[17]:

"...whatever may be the character of the property which is brought in by the partners when the partnership is formed or which may be acquired in the course of the business of the partnership it becomes the property of the firm and what a partner is entitled to is his share of profits, if any, accruing to the partnership from the realisation of this property, and up on dissolution of the partnership to a share in the money representing the value of the property. No doubt, since a firm has no legal existence, the partnership property will vest in all the partners and in that sense every partner has an interest in the property of the partnership. During the subsistence of the partnership, however, no partner can deal with any portion of the property as his own. Nor can he

13. Sec. 55 (1).
14. Forster v. Hale, 5 Ves 308.
15. Ex p. Connell, 3 Deac. 201 ; Ex. p. Hinds, (1849) 3 De G. & S. 163.
16. In re Adarji, A. I. R. 1929 Bom. 67.
17. A. I. R. 1966 S. C. 1300, at p. 1303.

assign his interest in a specific item of the partnership property to anyone. His right is to obtain such profits, if any, as fall to his share from time to time and upon the dissolution of the firm to a share in the assets of the firm which remain after satisfying the liabilities."

The property of the firm has got to be used exclusively for the purpose of the business of the firm. If any partner derives any profit or personal advantage by the use of the property of the firm he has to account for that profit and pay the same to the firm.[18] This rule is subject to contract between the partners.

16. Personal profits earned by partners.—Subject to contract between the partners—

(a) if a partner derives any profit for himself from any transaction of the firm, or from the use of the property or business connection of the firm or the firm name, he shall account for that profit and pay it to the firm ;

(b) if a partner carries on any business of the same nature as and competing with that of the firm, he shall account for and pay to the firm all profits made by him in that business.

Comments

Sub-sec. (a)—Personal profits earned by a partner

The partnership business is the joint business of all the partners and, therefore, duty of a partner is to act to the greatest common advantage rather than acting for personal profit at the cost of the firm. A partner is the agent of the firm for the purpose of the business of the firm. According to the rules of the law of agency no agent can deal on his own account in the business of agency without the consent of his principal.[19] If an agent, without the knowledge of his principal, deals in the business of agency on his own account instead of on account of his principal, the principal is entitled to claim from the agent any benefit which may have resulted to him from the transaction.[20] This sub-sec. makes every partner accountable to the firm for any personal profit made by him :

(i) from any transaction of the firm,

(ii) from the use of the property or business connection of the firm, or,

(iii) from the use of the firm name.

18. Sec. 16 (a).
19. Sec. 215, Indian Contract Act.
20. Sec. 213, Indian Contract Act.

In *Bentley* v. *Craven*[21], one of the partners in a firm of sugar refiners, who was considered expert in the job, was entrusted with the duty of purchasing sugar for the firm for being refined. He himself was a wholesale dealer in sugar. He supplied his own sugar, which he had purchased at a lower price, to the firm at the prevailing market rates and thereby made considerable profit. He did not let his co-partners know that he was selling his own sugar to the firm and thereby making profit out of this transaction of the firm. It was held that he was bound to account to the firm for the profit thus made by him.

Similarly, if a partner, without the knowledge of the other co-partners, directly or indirectly, himself purchases the property of the firm and thereby gains some benefit, he has to account for that benefit to the firm. In *Gordon* v. *Holland*[22], a partner sold the land belonging to the firm to a *bona fide* purchaser and then re-purchased that land himself, it was held that all the benefit made by this partner on re-purchase of the land had to be given to the firm.

Sub sec. (b)—Profits earned in competing business.

A partner is supposed to devote himself solely to the business of the firm. He should not carry on a competing business. If a partner carries on any business of the same nature as and competing with that of the firm, he shall account for and pay to the firm all profits made in the competing business.

It has already been observed that the partners can lawfully make a contract that a partner shall not carry on any business other than that of the firm while he is a partner.[23] Such a contract protects the interests of the partners in partnership and has been declared to be valid inspite of the rule contained in sec. 27, Indian Contract Act, which declares an agreement in restraint of trade as void. If such an agreement has been entered into then the question of any partner carrying on any other business, competing or non-competing, does not arise. Injunction can be obtained against a partner who after making such a contract tries to carry on some business other than that of the firm. However, even if there is no such agreement between the partners, it is expected that a partner shall not carry on a competing business, otherwise he will have to account for the profits of that business to the firm. If the business carried on by a partner is not of the same nature and is not in competition with the firm the partner concerned may retain the profits of that business to himself. The above-stated rule is subject to contract between the partners and, therefore, it is possible that a partner may be permitted by a contract to carry on competing business and also to retain the profits of that business with himself.

21. (1853) 13 Beav. 75 : 104 R. R. 373.
22. (1913) 108 L. T. Rep. 385.
23. Sec. 11 (2).

17. Rights and duties of partners after a change in the firm.—Subject to contract between the partners—(a) where a change occurs in the constitution of a firm, the mutual rights and duties of the partners in the reconstituted firm remain the same as they were immediately before the change, as far as may be :

(b) after the expiry of the term of firm.—where a firm constituted for a fixed term continues to carry on business after the expiry of that term, the mutual rights and duties of the partners remain the same as they were before the expiry, so far as they may be consistent with the incidents of partnership at will ; and

(c) where additional undertakings are carried out.—where a firm constituted to carry out one or more adventures or undertakings carries out other adventures or undertakings, the mutual rights and duties of the partners in respect of the other adventures or undertakings are the same as those in respect of the original adventures or undertakings.

Comments

This section contemplates three kinds of changes in a partnership firm :

1. Change in the constitution of the firm.—A change in the constitution of the firm occurs either when a new partner is admitted or a partner ceases to be a partner by retirement, expulsion, insolvency or death.

2. Business continued after the expiry of the term.—Partners may have originally agreed to carry on the business only for a fixed term, e. g., they become partners for a term of 5 years. It is possible that inspite of the completion of the term of 5 years partners do not close down the business, but continue to run the same.

3. Carrying out additional undertakings. - A firm may have been constituted to carry out one or more adventures or undertaking but subsequently the partners may decide to carry out so one more adventures or undertakings.

In all such cases the question arises that what will be position of mutual rights and duties of the parties after the changes mentioned above take place. Inspite of these changes the mutual rights and duties of the paters continue to be the same as they were existing earlier. This rule is, however, subject to contract between the partners. The partners may, by a contract vary their rights and duties when one or the other of the changes stated above take place.

CHAPTER IV

RELATIONS OF PARTNERS TO THIRD PARTIES

Introduction

Every partner is an agent of the firm for the purpose of the business of the firm. The relation between the partners is based upon their mutual agency and therefore an act of a partner done on behalf of the firm binds all the partners of the firm towards the third party. A question may arise as to in what way and to what extent for the act of one partner others can be made liable towards the third party. The rules regarding the same are contained in this Chapter.

Since every partner has the capacity as an agent to bind the firm the principles of the law of agency are applicable for the purpose of the liability of the partners towards third parties. A partner as an agent can bind the firm in the following circumstances :—

(1) When a partner has actual or express authority to do an act.

(2) When a partner has implied authority to do an act on behalf of the firm.

(3) When a partner has an authority in emergency to act on behalf of the firm.

(4) When the act although not within the authority of a partner is subsequently ratified by the firm.

(1) Express authority of a partner

Authority may be expressly conferred upon a partner to do certain acts on behalf of the firm. The firm is bound for any such act done by a partner for which the authority was conferred upon him.

(2) Implied authority of a partner

It may not always be possible to expressly mention every act which can be done by a partner. For certain matters it may be implied that the partner has a power to act on behalf of the firm. An authority which can be inferred from the circumstances of the case is known as the "implied", "apparent", "ordinary" or "ostensible" authority. According to Sec. 19 (1), the Act of a partner which is done to carry on, in the usual way, business of the kind carried on by the firm, binds the firm. Such an authority to bind the firm is known as his implied authority. What authority is implied, therefore, depends on the nature of the business carried

on by the firm. If the business is of a general commercial nature, a partner has an implied authority to buy and sell the goods, borrow money, contract debts, make payments or sign a negotiable instrument. Similarly, it is within the implied authority of a partner in a firm of bankers to accept deposits, grant loans, draw, accept or endorse a negotiable instrument. An authority to do all that may not be there with a partner of a firm of tailors and drapers. His authority would depend upon the nature of that particular business. Sec. 19 (2) mentions the following acts as being not covered within the implied authority of a partner :—

(i) To submit a dispute relating to the business of the firm to arbitration.

(ii) To open a banking account on behalf of the firm in his own name.

(iii) To compromise or relinquish any claim.

(iv) To withdraw a suit or proceedings filed on behalf of the firm.

(v) To admit any liability in a suit or proceeding against the firm.

(vi) To acquire immovable property on behalf of the firm.

(vii) To transfer immovable property belonging to the firm.

(viii) To enter into partnership on behalf of the firm.

In order to bind the firm by an act falling within the implied authority of a partner, sec. 22 further requires that such act must be done in the firm name or in a manner which shows that there is an intention to bind the firm. For example, if taking loan is within the implied authority of a partner, the firm would be bound if the loan is taken in the name of the firm. If a partner takes loan in his personal name, the firm cannot be bound for the same.

Extension and restriction of implied authority

The implied authority of a partner may be extended or restricted. Extending implied authority means expressly conferring power upon a partner to do certain acts which the implied authority does not warrant. The firm would obviously be liable for the same.

In case the implied authority of a partner is restricted the firm can still be made liable towards third party for an act of a partner which falls within the implied authority. In the following exceptional cases, however, the third party is bound by the restriction :—

(i) When the third party while dealing with the firm has the knowledge of the restriction ; and

(ii) When the third party does not know or believe that partner to be a partner.

For example, it is within the implied authority of a partner to borrow up to Rs. 1000/- but by an agreement this power is curtailed to Rs. 200/- only. If the third party does not know of the restriction and gives a loan of Rs. 1,000/- to a partner, he can make the firm liable for the same.

(3) Authority in Emergency

According to Sec. 21 a partner has an authority, in an emergency, to do all such acts for the purpose of protecting the firm from loss as would be done by a person of ordinary prudence, in his own case, acting under similar cirmumstances, and such act binds the firm. In emergency to protect the property of the firm the partner has an authority to do even such acts for which he does not have either the express authority or the implied authority.

(4) Liability by Ratification

When a partner does an act without any authority but on behalf of the firm, the firm if it so likes, may approve or ratify such an act. After ratification the firm becomes bound by that act as if the partner had been authorised to do the same.

Effect of admission by the partner

An admission or representation made by a partner in the ordinary course of business is an evidence against the firm. In case third party wants to make use of such admission or representation it can do so. The other partners, however, are free to give evidence and disprove such admissions or representations.

Effect of notice to acting partners

A notice to an agent is deemed to be a notice to the principal. Sec. 24 of the Act embodies the same rule and states that a notice to partner who habitually acts in the business of the firm of any matter relating to the affairs of the firm operated as a notice to the firm. There is one exception to this rule. If some fraud has been committed on the firm by or with the consent of a particular partner, notice to such a partner regarding that matter is not deemed to be a notice to the firm. Therefore, if a partner of a firm of carriers in violation of a rule of the firm, agrees to carry a parcel free of charge for one of his friends, the firm cannot be deemed to be having a knowledge of the carriage of such a parcel, and as such cannot be made liable towards the third party if the parcel is lost (*Bingold* v. *Waterhouse*).

Nature of liability of partners

According to Sec. 25 every partner is liable, jointly with all

the other partners and also severally, for all acts of the firm done while he is a partner. The liability of every partner, therefore, is joint and several. The liability is also unlimited. Such a liability is of every partner whether he is active or dormant.

The liability of the firm for the act of a partner not only means liability for the contract or other lawful acts of a partner but the liability is also for wrongful acts as well. If a partner commits a tort or fraud against a third party while acting on behalf of the firm, according to Sec. 26, the firm is liable therefor to the same extent as the guilty partner. In *Hamlyn* v. *John Houston & Co.* one of the partners induced the clerk of a rival business man to divulge the secrets of the business. This amounted to the tort of inducing breach of contract and the other partner of the firm who was not aware of this act was also held liable.

Similarly, if a partner receives some money or property on behalf of the firm and misapplies the same, the firm would be liable towards third party. In the same way if some money of property belonging to a third party has been received by the firm and then one of the partners misapplies the same, the firm would be liable for that also. (Sec. 27).

Doctrine of Holding Out

Generally, only a person who is a partner can be made liable as a partner towards a third part. Sometimes a person who is not a partner nor he may be associated in the business nor sharing the profits but still may be deemed to be a partner or held out to be a partner for the purpose of liability towards third party. Sec. 28 deals with such liability.

In order to make a person liable under the doctrine of holding out the following essentials are needed :—

(i) That such a person although he is not a partner must have represented himself to be a partner or knowingly permitted a representation to be made that he is a partner in the firm ;

(ii) The person who seeks to make such a person liable must have acted on the faith of such representation ; and

(iii) Relying on the representation he must have given credit to the firm.

The basis of the doctrine of holding out is the application of the law of estoppel. One who makes a representation, on the basis of which another person acts to his detriment, is not allowed to deny that representation. For example, if the partnership consists only of A and B but another person C, who is not a partner, makes a representation to X that he is also a partner. X gives credit to the firm on the basis of this representation made

by C. X can make C liable under the doctrine of holding out. If C himself does not make representation but knowingly permits another person, for example B, to make representation that C is a partner in the firm, C would be liable in this case also. If, however, C does not know that B is making any such representation he cannot be made liable on the basis of the doctrine of holding out (*Munton* v. *Rutherford*).

The liability for the doctrine of holding out as has been mentioned above, is only towards such a person who has relied on the representation. If X relies on the representation that C is a partner, he can make C liable. But another person, for example, 'Y' who does not know such a representation, cannot take advantage of the doctrine of holding out to make C liable.

The doctrine of holding out is applicable only if the person relying on the representation has given credit to the firm. If the basis of the action is the tort committed by one of the partners, a person who is not a partner cannot be made liable on the basis of holding out (*Smith* v. *Bailey*).

The principle of holding out has been made applicable to a parter who retires from a firm or who is expelled but the public notice of retirement of expulsion of the partner has not been given. However, where after partner's death the business is continued in the old firm name, the continued use of that name or of the deceased partner's name as a part thereof shall not of itself make his legal representative or his estate liable for any act of the firm done after his death. Public notice is needed on the retirement as well as expulsion of a partner so that those who had the impression that a particular person is a partner now come to know that he has ceased to be a partner. No public notice is needed in case of death or insolvency of a partner.

Rights of transfree of a partner's interest

A partner is not entitled to transfer the whole of his interest to an outsider so as to replace somebody else in his place as partner. It is, however, possible that a partner may transfer his interest in the firm to a third party. The following is the position of the third party in whose favour the interest has been transferred (Sec. 29) :—

(i) So long as the firm continues its business such third party does not have a right to interfere in the conduct of the business nor can he require accounts, nor inspect books of the firm. Such a transferee is only entitled to receive the share of profits of the transferring partner. Such a transferee shall have to accept the account of profits agreed to by the partners.

(ii) If the firm is dissolved or the partner who had transferred his share ceases to be a partner then the final settlement of accounts of the transferring partner obviously has to be there. At

that time the transferee of the share is entitled, as against the remaining partners, to receive the share of the assets of the firm to which the transferring partner is entitled, and, for the purpose of ascertaining that share he is also entitled to have an account as from the date of the dissolution.

Position of a minor in partnership

A minor is incompetent to contract and agreement made by him is void. For creating a partnership a contract is needed and therefore all the partners must be competent to contract. A minor, therefore, cannot be a partner in a firm. Sec. 30 permits a minor to be admitted to the benefits of partnership. He can be admitted to the benefits of partnership with the consent of all the partners. It is necessary that a firm must be already in existence before a minor can be admitted to the benefits of the same.

Such a minor has a right to such share of the property and the profits as may be agreed upon. He may have access to and inspect and copying any of the accounts of the firm. His right is limited only as regards the books of the accounts of the firm, unlike other partners he cannot have access to the other books. So long as he continues being associated, he cannot bring an action against the other partners in a court of law for an account or payment of his share of the property or profit of the firm but when he severes his connection he can file a suit for the same.

Since a minor is incompetent to contract, he does not incur any personal liability for any act of the firm. Only his share can be made liable.

Minor's position on attaining majority

When a person who was admitted as a minor to the benefits of partnership attains the age of majority he has to exercise an option, within six months of his attaining majority or of his obtaining knowledge that he had been admitted to the benefits of partnership, through a public notice whether he has elected to become a partner or he has elected to leave the firm. In case he fails to give any such notice then on the expiry of the said period of six months, he shall automatically become a partner of the firm.

In case he becomes a partner, his position will be as under :—

His rights and liabilities continue to be that of a minor upto the date on which he becomes a partner. So far as liability for the acts of the firm towards the third parties is concerned, he becomes personally liable to the third parties for all acts of the firm done since he was admitted to the benefits of partnership. The reason for such a liability is that he has already enjoyed the benefits of such acts of the firm since the date of his admission

to the benefits of partnership but no personal action could be brought against him so long as he was a minor and was not a partner. His share in the property and profits of the firm shall be the same to which he was entitled as a minor.

In case he elects not to become a partner, his rights and liabilities continue to be the same as that of a minor upto the date on which he gives a public notice. Since he severs his connection from the firm by a public notice, his share shall not be liable for any acts of the firm done after the date of the notice.

If a minor after attaining the age of majority represents or knowingly premits himself to be represented that he has become a partner in the firm, he can be made liable towards the third parties on the basis of the doctrine of holding out. This is irrespective of the fact that actually he may have elected not to become a partner.

18. Partner to be agent of the firm.— Subject to the provisions of this Act, a partner is the agent of the firm for the purposes of the business of the firm.

Comments

Mutual agency between the partners is one of the essentials needed to create partnership. From the point of view of the third parties a partner is an agent of the firm of the purpose of the business of the firm. Even if the act of the firm is done by only one of the partners on behalf of the firm, the third party can make the whole firm liable. Law of partnership is generally stated as a branch of the law of principal and agent. This Chapter incorporates various rules of the law of agency as applicable to partnerships.

According to Mr. Justice Story[1] : "Every partner is an agent of the partnership, and his rights, powers, duties and obligations, are in many respects governed by the same rules and principles as those of an agent ; a partner virtually embraces the character of both a principal and agent."

It has been observed by Lord Wensleydale[2] : "A man who allows another to carry on trade, whether in his own name or not, to buy and sell, and to pay over all the profits to him, is undoubtedly by the principal, and the person so employed is the agent, and the principal is liable for the agent's contracts in the course of his employment. So if two or more agree that they should carry on a trade and share the profits of it, each is a principal, and each is an agent for the other, and each is bound by the other's contract in carrying on the trade, as much as a single principal would be by the act of an agent, who was to give the whole of the profits to his employe."

1. Story on partnership, Section 1.
2. Cox v. Hickman (1860) 8 H. L. C. 268.

A partner is an agent of the firm. This agency is only for the purpose of the business of the firm. He can enter into contracts, purchase and sell goods, borrow money and do similar acts in so far as they are necessary for the carrying on the business of the firm and firm will be bound by every such act. If he, on the other hand, does an act unconnected with the business of the firm, e. g., purchases materials for the construction of his own building or borrows money for his daughter's marriage, the firm will not be bound by that as he is not firm's agent for that purpose.

19. Implied authority of partner as agent of the firm.—(1) Subject to the provisions of section 22, the act of a partner which is done to carry on, in the usual way, business of the kind carried on by the firm, binds the firm.

The authority of a partner to bind the firm conferred by this section is called his "implied authority."

(2) In the absence of any usage or custom of trade to the contrary, the implied authority of a partner does not empower him to—

(a) submit a dispute relating to the business of the firm to arbitration,

(b) open a banking account on behalf of the firm in his own name,

(c) compromise or relinquish any claim or portion of a claim by the firm,

(d) withdraw a suit or proceeding filed on behalf of the firm,

(e) admit any liability in a suit or proceeding against the firm,

(f) acquire immovable property on behalf of the firm,

(g) transfer immovable property belonging to the firm, or

(h) enter into partnership on behalf of the firm.

Comments

We have already noted that a partner is an agent of the firm for the purpose of the business of the firm. A partner can bind other partners by doing an act either for what he has been expressly authorised or for such acts for which he is deemed to be having an authority. According to sub-sec. (1) an act of a partner which is done to carry on, in the usual way, business of the kind carried on by the firm, binds the firm. Such an authority to bind the firm is known as implied authority. It may not be possible to expressly mention what can exactly be done on behalf of the firm. Depending on the nature of the business, a partner has certain implied authority. Implied authority of a partner depends upon

the nature of the business of the firm. For an act to be covered within the implied authority it is necessary that—

(i) the act should be done in relation to the partnership business ;

(ii) the act should be done for carrying on the business of the firm in the usual way ; and

(iii) the act must be done on behalf of the firm.

When a partner acts within such an "implied", "apparent", "ordinary" or "ostensible" authority, the firm will be bound to the third parties even though for such an act no specific actual authority has been conferred upon the partner. The reason for making the firm liable towards the third parties for acts which fall within the implied authority of a partner is that the third party cannot always know what exact authority has been conferred on each partner, but the third party can always rely on the assumption that since a partner is an agent of the firm, he may be having an authority to do all what is necessary to carry on the business of the firm. Nature of the business, therefore, determines the scope of the implied authority of a partner. If it is a firm of sugar merchants, sale and purchase of sugar is within the implied authority of any of its partners. Similarly, a partner in a firm of bankers may accept deposits, grant loans, draw, endorse or accept a negotiable instrument and thereby bind the firm. But if a partner in a firm of grain merchants does all that, that will be outside the authority of the partner for which the firm cannot be bound. In *Mercantile Credit Company Limited v. Garrod*[3], a firm consisting of two partners Parkin and Garrod was carrying on garrage business which was concerned with letting lock-up carriages and repairing cars. Parkin was active partner whereas Garrod was a sleeping partner. Sale of second hand cars could be impliedly considered to be the business of the firm. Parkin, without the authority of his co-partner Garrod, sold a car to the Mercantile Credit Company Ltd. over which he had no title and received a sum of £ 700 for the same. On knowing that the seller had no title to the car, the company brought an action against Garrod to claim £ 700 from him. It was held the sale of the car to the company by one of the partners was an act for carrying on, in the usual way, the business of the kind carried on by the firm and, therefore, for such an act, which was within his implied authority, the other partner of the firm could be made liable.

When a partner has implied authority to do something the firm will be bound by such an act even though the partner may be acting in fraud of his co-partners. This is on the basis of the well-established principle laid down in *Llyod v. Grace, Smith & Co.*[4] that the principal is liable for the act of the agent if the act

3. (1962) 3 All E. R. 1103.
4. (1912) A. C. 716.

is within the scope of the agent's authority even though the agent may be acting for his personal gain and the principal may not be knowing about the transaction. Similarly, in *Hamlyn* v. *John Houston & Co.*[5] one of the partners committed a tort of inducing breach of contract by bribing the clerk of a rival business man in order to know the secrets of the rival business man. The other partner was not aware of this tort. It was held that it was within the authority of a partner to lawfully do what had been done unlawfully. Therefore, the other partner was also held liable for the tort.

It is also necessary that the act done by a partner must be done to carry on, in the usual way, business of the kind carried on by the firm. What is usual for one kind of business may not be so for another kind of business. In a trading firm every partner will have an implied authority to borrow money for the purpose of the business and thus make the other partners also liable for the amount so borrowed.[6] If the business is of a general commercial nature the partner may pledge or sell partnership property, he may buy goods, borrow money, contract debts, and make payments on behalf of the firm, he may draw, make, sign, endorse, accept or transfer a negotiable instrument on behalf of the firm.[7] In a non trading business, for example, that of an auctioneer, a partner cannot borrow money as it has been held in *Wheatly* v. *Smiths*[8] that an auctioneer is not a trader because his bussiness was not for the buying or selling of goods. In *Higgins* v. *Beauchamp*,[9] Milles an active partner of cinema proprietors borrowed money from Higgins. Higgins brought an action against the sleeping partner Beauchamp. It was held that business of the firm was not a trading one and therefore the firm was not bound by the loan taken by one partner in this case.

Sec. 19 (1) is subject to the provisions of Sec. 22 which further requires that in order to bind the firm the act of the partner must be done on behalf of the firm in a manner which shows that there is an intention to bind the firm. If an act which would ordinarily be within the implied authority of a partner is done by a partner in his personal name and not on behalf of the firm, the firm will not be liable. For example, a partner of a trading firm borrows money without indicating that he is acting on behalf of the firm, the loan is deemed to have been taken by the partner for himself personally, for which the firm will not be liable.

Restrictions on implied authority

Sub-sec. (2) mentions the list of acts regarding which a partner does not have an implied authority unless there is a usage or

5. (1903) 1 K. B. 81.
6. Perumal v. A. Muhammad, A. I. R. 1958 Ker. 25.
7. Bank of Astralasia v. Breillate (1847) 6 Moo. P. C. 152
8. (1937) 2 K. B. 684.
9. (1914) 3 K. B. 1892 ; (1914-15) All E. R. 937.

custom of trade to the contrary. For example, a partner does not have any implied authority to acquire immovable property on behalf of the firm or to transfer immovable property belonging to the firm. Such an act can be done by a partner only if he has been expressly authorised by the other co-partners to do that act on behalf of the firm. If a partner has done an act which does not fall within his authority the same could be ratified by the other partners and upon ratification of such an act the firm become bound by the same.

20. Extension and restriction of partner's implied authority.—The partners in a firm may, by contract between the partners, extend or restrict the implied authority of any partner.

Notwithstanding any such restriction, any act done by a partner on behalf of the firm which falls within his implied authority binds the firm, unless the person with whom he is dealing knows of the restriction or does not know or believe that partner to be a partner.

Comments

This section enables the partners to extend or restrict the implied authority of a partner. A partner may be expressly authorised to do something for which he does not have implied authority. The firm will be bound by such an act of the partner.

When a restriction has been imposed on the implied authority of a partner, such a restriction is not binding on the third party unless the third party has the knowledge of the restriction. There is a difference between the statutory restrictions which have been imposed by sec. 19 (2) on the implied authority of a partner and the restrictions on the implied authority which may be imposed under sec. 20 by a contract between the partner. The statutory restrictions are effective against all the third parties as they are deemed to be having the knowledge of the restrictions. The third parties, however, cannot be prsumed to be having the knowledge of the restrictions which the partners may impose by a contract between themselves, and, therfore, a third party can be bound by a restriction imposed under Sec. 20 if he had the actual knowledge of such a restriction. In *Motilal* v. *Unnao Commercial Bank*[10] a restriction was placed by a partnership deed on the authority of the partners to borrow money. One of the partners borrowed money any accepted a bill of exchange, it was held that since the third party did not know of the restriction, the firm was liable towards such third party. Similarly, in *Prembhai* v. *Brown*[11] one of the partners of a firm of carriers was authorised to draw bills on the firm to the extent of Rs. 200 each. This fact was known to a third party in whose favour the partner made two promissory notes for Rs. 100/- each. It was held that the firm

10. (1930) 32 Bom. L. R. 1571.
11. (1873) 10 Bom. H. C. Rep. 319.

could not be bound for the amount of the Notes drawn as the restriction on the implied authority was within the knowledge of the third party.)

21. Partner's authority in an emergency.—A partner has authority in an emergency to do all such acts for the purpose of protecting the firm from loss as would be done by a person of ordinary prudence, in his own case, acting under similar circumstances, and such acts bind the firm.

Comments

A partner can bind the firm by doing an act on its behalf if the act falls within the express or implied authority of the partner. Apart from that this section confers an authority on a partner in emergency for doing all such acts for the purpose of protecting the firm from loss as would be done by a person of ordinary prudence, in his own case. For such an act the firm would be bound towards the third party. The authority conferred by this section is similar to the authority conferred upon an agent under section 189 of the Indian Contract Act. If a partner makes some payments or incurs liability in doing an act, in an emergency, for the purpose of protecting the firm from loss, and he has acted as a prudent man in like circumstances would have acted in his own case, the firm shall indemnify the partner for the same.

22. Mode of doing act to bind firm.—In order to bind a firm, an act or instrument done or executed by a partner or other person on behalf of the firm shall be done or executed in the firm name, or in any other manner expressing or implying an intention to bind the firm.

Comments

A firm is bound by the act of a partner which is done by him within his implied authority. In order that the firm can be bound, this section requires that the act or the instrument done or executed by a partner must be done or executed—

(i) in the name of the firm ; or

(ii) in a manner expressing or implying an intention to bind the firm.

If a partner does an act without indicating that he is acting on behalf of the firm, the act is deemed to have been done by him on his own behalf and the firm cannot be made liable for the same. If the act has been done on behalf of the firm, all the other partners become liable. Even when the names of the other partners are not mentioned they are in the position of undisclosed principal and are as such liable.[12] For such an act a dormant partner is also liable in the same way as any other partner.[13]

12. Venkatasubbiah Chetty v. G. N. Naidu, I. L. R. (1908) 31 Mad. 45.
13. Beckham v. Drake, 9 M. & W. 79.

When a partner does an act or executes an instrument in his own name only and not on behalf of the firm, and there appears to be no express or implied intention to bind the firm, the firm will not be bound by that. The third party, in such a case, is deemed to be acting only on the personal credit of the dealing partner, who alone will be liable for such a transaction. It is immaterial that the firm derives no benefit from this transaction.[14]

23. Effect of admission by partner.—An admission or representation made by a partner concerning the affairs of the firm, is evidence against the firm, if it is made in the ordinary course of business.

Comments

Partner being an agent of the firm for the purpose of the business of the firm an admission or representation made by a partner concerning the affairs of the firm is evidence against the firm. For example, admission by one partner regarding making of a contract, execution of a document, payment of money, supply of goods or financial condition of firm, will be evidence against all the other partners. It is, of course, necessary that such admission or representation must have been made in the ordinary course of business. Similarly, representations made by a partner also have the same effect.

The admissions and representations constitute an evidence against the firm provided a third party wants to make use of such admissions or representations.

An admission and representation made by a partner is simply an evidence against the firm. Evidence can be given to disprove such admissions or representations made by a partner as they do not constitute conclusive proof of the matters admitted or represented.

24. Effect of notice to acting partner.—Notice to a partner who habitually acts in the business of the firm of any matters relating to the affairs of the firm operates as notice to the firm, except in the case of a fraud on the firm committed by or with the consent of that partner.

Comments

Section 24 also embodies another general principle of the law of agency. Notice to an agent concerning the matters of agency is deemed to be a notice to the principal. Section 24 provides that notice to a partner who habitually acts in the business of the firm of any matter relating to the affairs of the firm operates as a notice to the firm.

14. See British Homes Ass. Corp Ltd. v. Paterson (1902) 2 Ch. 404; and Gree v. Downs Supply Co. (1927) 2 K. B. 28.

Such a notice binds only such partners who are there at the time when the notice was given. Therefore, if some notice had been given earlier, it will not bind a partner who is introduced as a partner after such notice. Similarly, an outgoing partner cannot ordinarily be bound by a notice relating to subsequent matters. However, if public notice of dissolution of a firm of ceasing of a partner to be a partner has not been given, the partners continue to be liable as before and notice in such cases may affect even those partners who are no more partners.

In order that notice to one partner operates as a notice to the whole firm it is necessary that the notice must have been given to a partner who habitually acts in the business of the firm. Notice to a dormant or a sleeping partner would, therefore, not be considered to be a notice to others.

Exception.—If a fraud has been committed on the firm by or with the consent of a particular partner, notice to such a partner regarding that matter is not deemed to be a notice to the firm. If in any particular matter an agent is himself party to the fraud, he cannot be presumed to be passing on such information to his principal. In such matters, therefore, notice to the agent does not serve as notice to the principal.

In *Bignold* v. *Waterhouse*[15] the defendents, a firm of carriers, according to the rules, were accountable for parcels above the value of £ 5 only if such parcels had been specially entered and paid for. One of the working partners allowed to be carried one parcel of a personal friend without any consideration and he did not bring this fact to the notice of his other co-partners. In an action for the loss of the parcel against the firm, it was held that the firm was not liable as notice to one of the partners about the carrying of the parcel was not deemed to be notice to others because the particular partner who had the knowledge of the parcel was a party to the fraud as no payment had been made for the transportation of the parcel.

25. Liability of a partner for acts of the firm.—Every partner is liable, jointly with all the other partners and also severally, for all acts of the firm done while he is a partner.

Comments

A principal is liable for the act of his agent done by him on his behalf. According to Section 18, it has been noted above, a partner is an agent of the firm for the purpose of the business of the firm. Obviously, therefore, the whole of the firm, which means all the partners of the firm, become liable for an act of the firm done by any partner.

Section 25 mentions the nature of such a liability. It says

15. 1813, 1 M. & S. 255 : 105 E. R. 95.

that every partner is jointly and severally liable for all acts of the firm done while he is a partner.

Joint and Several Liability

The liability of all the partners is joint and several even though the act of the firm may have been done by only one of them. Such liability is there for all acts of the firm. According to section 2 (a) an act of a firm means any act or omission by all the partners or by any partner or agent of the firm which gives rise to a right enforceable by or against the firm. It, therefore, means that any act or omission which creates a right enforceable is an act of the firm. It may be a contract or a wrongful act, for example, fraud, negligence, mis-application of money or any tort. All the partners are liable as much for the wrongful act of any partner as they would be liable for a contract entered into by one of them on behalf of the firm. In India the liability of the partners for contracts as well for torts is joint and several. In England, the partners are liable jointly in respect of contracts but they are liable jointly and severally in respect of torts.

The basis of the liability of partners being mutual agency as between them, the liability of the partner, therefore, arises for such acts which are done while a person is a partner. A partner, therefore, cannot be made liable for an act of the firm which may have been done before he was introduced to partnership. Similarly, there can be no liability for the acts of the firm done if a person has ceased to be a partner. This rule, of course, is subject to the provisions mentioned in sections 32 (3) and 45, according to which inspite of the retirement of a partner or the dissolution of a firm, the liability of the partners may continue as before until a public notice of retirement or dissolution of the firm is given.

The liability as mentioned in this section is for all the partners whether they are active or dormant. The principle behind the liability of the partners being mutual agency which is impliedly there between all the partners, the liability of every partner, therefore, arises for every act of the firm done while he is a partner.

The liability of all the partners is not only joint and several but is also unlimited. It is the discretion of the third party to bring an action against some or all the partners. No partner can be allowed to take the plea that between the partners themselves the agreement provides only limited liability for him or responsibility for only a part of the share of the loss. The third party may, therefore, bring an action against any one of the partners themselves, the partner paying for more than his share of the responsibility may claim contribution from the others.

26. Liability of the firm for wrongful acts of a partner.— Where, by the wrongful act or omission of a partner acting in the

ordinary course of the business of a firm, or with the authority of his partners, loss or injury is caused to any third party or any penalty is incurred, the firm is liable therefor to the same extent as the partner.

Comments

It has been noticed above that for an act of the firm every partner is liable and that includes liability for wrongful acts also. Section 26 specifically provides regarding such liability. It states that where by the wrongful act or omission of a partner loss or injury is caused to any third party, or any penalty is incurred, the firm is liable therefor to the same extent as the guilty partner. The wrongful acts may be tort, fraud, negligence or misapplication of money or mis-appropriation of property. Section 27 explains such liability separately in case of mis-application of money or property.

According to well-settled rules of Law of Tort a master is vicariously liable for the wrongs of his servant done in the course of employment. Similar rule is applicable in the case of principal and agent also. Since the relationship between the partners is that of principal and agent, the same kind of liability for partners has been incorporated in section 26. The case of *Lloyds v. Grace, Smith & Co.*,[16] which recognized such liability for the principal, would explain the position. In that case one Mrs. Llyod, a widow, who owned two cottages called at the office of Grace, Smith & Co., a firm of solicitors. She wanted to consult this firm as she was not satisfied with the income which she was having from these two cottages. She was attended by the managing clerk of the company. The managing clerk advised her to sell the cottages and for that purpose asked her to sign two documents which were supposed to be sale deeds. The managing clerk had fraudulently prepared the two documents as gift deeds in his own name. He then diposed off the said property and misappropriated the money. The House of Lords unanimously held that Grace, Smith & Co. were liable for the fraud of their agent even though the agent had been acting for his personal gain and without the knowledge of his principal.

In *Hamlyn v. John Houston & Co.*[17] for the tort committed by one partner the other partner was also held liable. There, one of the two partners of the defendant's firm acting within the general scope of his authority as a partner bribed the plaintiff's clerk and induced him to make a breach of contract with his employer, that is the plaintiff, by divulging some secrets relating to his employer's business. It was held that although the wrong of inducing breach of contract had been committed by only one of the partners and the other partner had no notice of the same yet since the wrong was done in the scope of the authority of the wrongdoing partner, the other partner was also held liable.

16. 1912 A. C. 716.
17. (1903) 1 K. B. 81 : 51 W. R. 99.

In *Hurruck Chand* v. *Gobind Lal*,[18] one of the partners, who was an active partner in a firm, knowing that the goods were stolen ones, purchased and sold them without the knowledge of the other partner who was a sleeping partner. It was held that both the partners were liable for the tort of conversion to the owner of the goods.

27. Liability of firm for misapplication by partners.— Where—

(a) a partner acting within his apparent authority receives money or property from a third party and misapplies it; or

(b) a firm in the course of its business receives money or property from a third party and the money or property is misapplied by any of the partners while it is in the custody of the firm,

the firm is liable to make good the loss.

Comments

This section deals with liability for particular kind of wrongful act *i. e.*, liability for misapplication of money or property of a third party. In this section two kinds of cases of misapplication of money or property have been mentioned :—

(i) when the money or property has been received by a partner and he misapplies the same without accounting for it to the firm ; and

(ii) when the money or property has been received by the firm from third party and the same is misapplied by any of the partners.

In either case the firm is liable to make good the loss to the third party.

1. Liability for money or property received by a partner who misapplies the same :—

According to section 27 (a) when partner acting within his apparent authority receives money or property from a third party and misapplies the same, the firm is liable for that. In *Willett* v. *Chambers*,[19] one of the partners of a firm of solicitors and conveyancers received money from a client for being invested on a mortgage and mis-applied the same. The other partner who was ignorant of this fraud was also held liable along with the guilty partner.

Similarly, in *Rhodes* v. *Moules*[20] one of the partners of a firm

18. (1906) 10 Cal. W. N. 1053.
19. C. O. W. P. 814.
20. (1895) 1 Ch. 236.

of solicitors was requested by a client to obtain loan for the client on the mortgage of some property. The said partner told the client that the mortgagees wanted some additional security and thus obtained from the client some share warrants payable to bearer. He subsequently misappropriated the share warrants and absconded. The other partners had no knowledge of the deposit of the warrants and subsequent appropriation thereof. It was found that on some earlier occasions such share warrants had been received through the same partner from the same client by this firm. It was therefore, held that it was within the apparent authority of the partner to receive the share warrants, the transaction was a partnership transaction and the other partners were liable for the misappropriation of the warrants made in the case.

If the money or the property has been received by a partner not in the ordinary course of business of the firm but only in his personal capacity, the firm cannot be liable for the same. In *British Homes Corporation Ltd.* v. *Patterson*[21] one of the partners of a partnership firm obtained a cheque payable to himself and not in the name of the firm, it was held that for the mis-appropriation of such a cheque which had been received by him in his personal capacity, the other partner could not be made liable.

In *Cleather* v. *Twisden*[22], one of the partners of a firm of solicitors received some bounds payable to bearer and mis-appropriated the same. It was found that the receipt of such securities for safe custody was not a part of the business of the solicitors and therefore it was held that the other partners could not be held liable for the same. The position would have been different as was there in the case of *Rhodes* v. *Moules*[23] if the receipt of such bonds had been within the implied authority of the partner concerned.

(4) Liability for misapplication of money or property received by the firm and misapplied by a partner :

Where the firm in the course of its business receives money or property from a third party and the same is misapplied by any of the partners while it is in the custody of the firm, the firm can be made liable towards the third party to make good the loss. In *Blair* v. *Bromley*[24], a firm of solicitors consisting of two partners received some money to be invested in a mortgage. The money was deposited with the firm's bankers. Only one of the partners attended to the monetary transactions of the firm. This partner misapplied the money but continued falsely telling the client that the same had been invested. The client was paid interest regularly by the said partner who attended to the matter. The fraud was not known to the othe partner, but it was held that the other part-

21. (1902) 86 L. T. 826.
22. 23, Ch. D. 340.
23. (1855) 1 Ch. 236.
24. 5 Hare 542.

ner could be made liable for the same. Similarly, in *Ex parte Biddulph*[25] one of the partners of a firm of bankers withdrew the trust money and misapplied the same. All the partners of the firm were held liable to make good the loss. In the same way in *Sadler v. Lee*[26], when one of the members of the firm of bankers misapplied the money which had been credited with the firm as sale proceeds of the stock of a customer, all the members of the firm were held liable for such misapplication.

28. Holding out.—(1) Any one who by words spoken or written or by conduct represents himself, or knowingly permits himself to be represented, to be a partner in a firm, is liable as a partner in that firm to any one who has on the faith of any such representation given credit to the firm, whether the person representing himself or represented to be a partner does or does not know that the representation has reached the person so giving credit.

(2) Where after a partner's death the business is continued in the old firm name, the continued use of that name or of the deceased partner's name as a part thereof shall not of itself make his legal representative or his estate liable for any act of the firm done after his death.

Comments

Every partner is liable for all acts of the firm done while he is a partner. Therefore, generally a person who is not partner in the firm cannot be made liable for an act of the firm. In certain cases, however, a person who is not a partner in the firm may be deemed to be a partner or held out to be a partner for the purpose of his liability towards a third party. The basis of liability of such a person is not that he was himself a partner or was sharing the profits or was taking part in the management of the business, but the basis is the application of the law of estoppel because of which he is held out to be a partner or is deemed to be partner by 'holding out'.

The doctrine of holding out is a branch of the law of estoppel. According to the law of estoppel if a person, by his representation, induces another to do some act which he would not have done otherwise, then the person making the representation is not allowed to deny what he asserted earlier.

Therefore, if a person who is not a partner, by his representation, creates an impression in the third party that he is a partner, on the basis of which the third party gives credit to the firm, the person making such a representation will be held out to be a partner. In the words of Lord Denman, C. J.[27]

25. 3 De G. & Sm. 587.
26. 6 Beav. 324.
27. Pickard v. Sears (1837) 6 A. & E. 469.

".....where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is precluded from averring against the latter a different state of things as existing at the same time....."

For example, a partnership firm consists of A, B, & C. D, who is not a partner, makes a representation to X that he is also a partner and on the faith of this representation X gives credit to the firm : In this case X can make D liable on the basis of holding out and D is estopped from denying that he is partner in the firm.

The principle was thus stated by Eyre C. J. in *Waugh* v. *Carvar* :[28]

"Now a case may be stated in which it is the clear sense of the parties to the contract that they shall not be partners, that A is to contribute neither labour nor money, and, to go still further, not to receive any profits. But if he will lend his name as a partner, he becomes against all the rest of the world a partner, not upon the ground of the real transaction between them, but upon principles of general policy, to prevent the frauds to which creditors would be liable, if they were to suppose that they lent their money upon the apparent credit of three or more persons, when, in fact, they lent it only to two of them, to whom without the others they would have lent nothing."

For the application of the doctrine of holding out section 28 (1) requires the persence of the following essentials :

1. The person sought to be made liable under the doctrine of hoiding out either has himself represented, or knowingly permitted somebody else to represent, that he is a partner in the firm.

2. The third party who wants to bring an action must have acted on the faith of the representation and given credit to the firm.

1. Representation

In order to make a person liable under the doctrine of holding out it has to be proved that either he himself made a representation or knowingly permitted such a representation to be made by someone else. In other words there has to be a representation by a person by words spoken or written or by his conduct that he is a partner in the firm. Representation in any form indicating that a person is a partner in the firm will create the liability. Fraudulent intention to mislead another person is not required. Whether the liability for holding out exists or not

28. (1793) 2 H. Bl. 235 : Also see Ex p. Watson, 19 ves 459; Ex. p. Matthews, 3 V. & B. 125 ; De Berkom v. Smith. Esp. 29.

depend on motive of the person making the representation but on the fact that a third party has given credit on the faith of that representation. When the third party has acted on the representation the section creates the liability whether the person representing himself or represented to be a partner does or does not know that the representation has reached the person so giving credit. The presence of the two essentials, i. e., the representation by one person about the fact of his being a partner and the acting by a third party on the faith of the representation are enough to create liability under the doctrine. Thus, in *Snow White Food Product Pvt. Ltd.* v. *Sohan Lal Bagla*[29] it was held that by his verbal negotiations and subsequent correspondence, Sohanlal represented as a partner of a firm of carriers and, therefore, he was a partner by holding out.

It has been noted above that the liability under the doctrine of holding out arises when a person has either made a representation that he is a partner or *knowingly permitted such a representation to be made by someone else.* If I know that I am being wrongly represented as a partner I have a duty to deny that. If knowing that fact I permit the representation to be made the law of estoppel will apply against me and I can be held out to be a partner. In case it is being represented that a person A is partner in a firm but A is not aware of such a representation, the question of A's liability under the doctrine of holding out does not arise. The position can be explained by referring to the case of *Munton* v. *Rutherford*.[30] In that case one, Beckwith published a statement in a newspaper that he and Mrs. Rutherford had formed a partnership. The statement was false and Mrs. Rutherford did not know about the same. It was held that Mrs. Rutherford was not liable as a partner by estoppel or holding out. It was observed :

".....If she had been shown the article, and assented to and credit had been given on the strength of such assent, the rule of estoppel would have applied. There being no evidence that she authorised or assented to it, there is no room for the application of the rule."

Knowingly permitting oneself to be represented does not mean mere careless in allowing oneself to be represented as a partner. In *Tower Cabinet Co.* v. *Ingram*[31], partnership consisted of Christmas and Ingram. The partnership was dissolved and thereafter the business was carried on by Christmas alone. Christmas used an old notepaper of the firm bearing the name of both Christmas and Ingram and placed an order for the purchase of some furniture from Tower Cabinet Co. Tower Cabinet Co. used Ingram to make him liable on the basis of the doctrine of holding

29. A. I. R. 1964 Cal. 209.
30. 121 Mich 418.
31. (1949) 1 All E. R. 1033.

out. It was held that merely because Ingram was negligent in not getting the old notepapers destroyed when he left the firm, it cannot be inferred that he permitted himself to be represented as a partner and therefore he was not liable. Lynskey J. observed[32] :

"Before the company can succeed in making Mr. Ingram liable.....they have to satisfy the court that Mr. Ingram, by words spoken or written or by conduct, represented himself as a partner. There is no evidence of that. Alternatively, they must prove that he knowingly suffered himself to be represented as a partner. The only evidence of Mr. Ingram's having knowingly suffered himself to be so represented is that the order was given by Mr. Christmas on notepaper which contained Mr. Ingram's name. That would amount to a representation by Mr. Christmas that Mr. Ingram was still a partner in the firm, but, on the evidence and the master's finding, that representation was made by Mr. Christmas without Mr. Ingram's knowledge and without his authority. That being the finding of fact, which is not challenged, it is impossible to say that Mr. Ingram knowingly suffered himself to be so represented. The words are "knowingly suffers"—not being negligent or careless not seeing that all the notepapers had been destroyed when he left."

2. Acting on the faith of representation and giving credit

In order to entitle a person to bring an action under the doctrine of holding out it has to be shown that he acted on the faith of the representation and gave credit to the firm. But if a person while giving credit to the firm did not know about the representation he can't take advantage of this doctrine and make such person liable as a partner.[33] The estoppel can be relied upon only by the person to whom the representation has been made, and who has acted upon the faith of it.[34] For example, D who is not actually a partner in the firm consisting of A, B & C represents to X that he is also a partner in that firm. On the faith of that representation X gives credit to the firm. X can make D liable under the doctrine of holding out. But if Y, who does not know of the representation gives credit to the firm of A, B & C, he cannot make D liable.

Torts

The liability under the doctrine of holding out arises when the person acting on the faith of representation has given credit to the firm. If the basis of the action is the tort committed by one of the partners, the doctrine of holding out does not apply in such a case.

32. Ibid., at p. 1036.
33. Tower cabinet Co. v. Ingram (1949) 2 K. B. 397 ; In Re Fraser (1892) 2. Q. B. 633; Juggilal Kamalapat v. Sew Chand Bagree A. I. R. (1960) Cal. 463.
34. In Re Fraser (1892) 2 Q. B. 633.

In *Stables* v. *Eley*,[35] a retired partner was held liable for the negligence of a cart driver of the firm because the name of the retired partner still continued to be there on the cart.

The above case has been disapproved by the Court of Appeal in *Smith* v. *Bailey*[36] as the liability arising out of tort is not covered by the doctrine.

Position of a retired Partner

When a partner retires the relation of partnership between the retiring and the other partners comes to an end. If a third party who knew of the existence of this relationship does not know that the relationship has come to an end and gives credit to the firm, he can make the retiring partner also liable. Similarly, if he gives credit to the retiring partner thinking him to be still a partner he can make the continuing partners liable. In other words from the point of view of the third parties the mutual agency which had earlier come into existence is still presumed to be continuing until public notice of retirement is given. Sec. 32 (3) provides that "Notwithstanding the retirement of a partner from, firm, he and the partners continue to be liable as partners to third parties for any act done by any of them which would have been an act of the firm if done before the retirement, until public notice is given of the retirement."

Such public notice may be given either by the retired partner or by any partner of the reconstituted firm.[37]

The reason for liability even after the retirement is that the absence of the notice of revocation of an agent's authority makes the principal liable to those who act on the supposition that the agency still continues.

Lord Blackburn referring to liability in such cases stated[38]: "I do not think that the liability is upon the ground that the authority actually continues. I think it is upon the ground that there is a duty upon the person who has given that authority, if he revokes it, to take care that notice of that revocation is given to those who might otherwise act on the supposition that it continued; and the failure to give that notice precludes him from denying that he gave the authority against those who acted upon the faith that authority continued."

No public notice is needed on the retirement of a dormant partner, *i. e.*, a partner who is not known as such to third parties, because the Partnership Act further provides that a retired partner is not liable to any third party who deals with the firm without

35. 1. C. and P. 664.
36. (1891) 2 Q. B. 403.
37. S. 32 (4).
38. Scarf v. Jardine (1882), 7 A. C. 345, 357.

knowing that he was partner.[39] The object of public notice being to remove the impression from the mind of the third parties that a certain person was a partner no public notice is needed when the third parties had no such impression.

An important point came for consideration in *Scarf* v. *Jardine*[40], where a third party was ignorant of either the retirement of a partner or the introduction of a new partner, when both the changes had taken place simultaneously. In that case a firm consisted of two partners, A and B. A retired and C joined the partnership in his place. No notice of the change was given. A customer of the old firm, who was not aware of the abovestated change, supplied goods to the reconstituted firm. To recover the price of the goods he brought an action against B and C. Having failed to recover the price from them he brought another action against A. The question before the court was, whether the third party who had supplied goods to the firm, could successfully bring action against A, B and C. It was held that when the customer is ignorant of the retirement of A as well as the introduction of C, he has an option to sue either A and B on the ground of estoppel or B and C on the basis of actual facts. Since A never held himself out as a partner alongwith B and C both, he cannot make A, B and C all of them liable. Therefore, after having elected to sue B and C he cannot bring an action against A. The position would have been different if he was aware of the introduction of C to the firm but was not aware of the retirement of A. Then he could presume that C had joined the firm which already consisted of A and B and in that situation could make all the three partners liable.

The position of an expelled partner is the same as that of a retired partner[41] and in his case also a public notice of expulsion has got to be given to avoid his liability for the acts done after the date of expulsion.

Death of a partner

On the death of a partner there is automatic dissolution of a firm unless there is a contract to the contrary between the partners.[42] When there is a contract between the partners by virtue of which the firm is not dissolved *viz.*, the remaining partners continue the business—the fact that the business of the firm is continued in the old firm name, does not of itself make the legal representatives or the estate of the deceased partner liable for an act of the firm done after his death.[43] The position of the legal representatives of a deceased partners is different from that of a retired partners, as the former will not be liable for the acts of the

39. Proviso to sec. 32 (3).
40. (1882) 7 A. C. 345.
41. See sec. 33 (2).
42. S. 42 (c).
43. S. 28 (2) : Also see Proviso to S. 45 (1).

firm done after the death of the partner even though no public notice of partner's death is given.

29. Rights of transferee of a partner's interest.—(1) A transfer by a partner of his interest in the firm, either absolute or by mortgage, or by the creation by him of a charge on such interest, does not entitle the transferee, during the continuance of the firm, to interfere in the conduct of the business, or to require accounts, or to inspect the books of the firm, but entitles the transferee only to receive the share of profits of the transferring partner, and the transferee shall accept the account of profits agreed to by the partners.

(2) If the firm is dissolved or if the transferring partner ceases to be a partner, the transferee is entitled as against the remaining partners to receive the share of the assets of the firm to which the transferring partner is entitled, and, for the purpose of ascertaining that share, to an account as from the date of the dissolution.

Comments

The relation of partners is based upon mutual confidence and trust and obviously, therefore, no person may be introduced as a partner in the firm without the consent of all the existing partners.[44] It follows that no partner can assign his share in a way which may substitute an outsider in his place. If any partner transfers the whole of his interest in the firm to a third party, the other partners may apply to the court for the dissolution of the firm.[45] It is however, possible that a partner may transfer his interest in the business in favour of a third person. Section 29 deals with the rights of the transferee of a partner's interest.

Sub-sec. (1).—During the continuance of the firm the transferee of partner's interest does not become entitled to interfere in the conduct of the business of the firm. Nor can such a transferee require accounts, nor can he inspect the books of the firm. He is bound to accept the account of profits agreed to by the partners. His only right is to receive the share of profits of the transferring partner. The reason why the transferee is not entitled to interfere in the conduct of the business is that partnership being based on mutual confidence and trust between the partners, there should be no interference by any outsider.

Sub-sec. (2).—When the firm is dissolved or the transferring partner ceases to be a partner there is obviously final settlement of accounts. At that time the transferee is entitled to the share of assets of the transferring partner. For the purpose of ascertaining such share he is also entitled to an account as from the date of the dissolution. What is meant by the share of a partner

44. Section 31 (1).
45. Section 44 (e).

is his proportion of the partnership assets after they have been realised and converted into money, and all the partnership debts and liabilities have been paid and discharged.[46]

30. Minors admitted to the benefits of partnership.—(1) A person who is a minor according to the law to which he is subject may not be a partner in a firm, but, with the consent of all the partners for the time being he may be admitted to the benefits of partnership.

(2) Such minor has a right to such share of the property and of the profits of the firm as may be agreed upon, and he may have access to and inspect and copy any of the accounts of the firm.

(3) Such minor's share is liable for the acts of the firm, but the minor is not personally liable for any such act.

(4) Such minor may not sue the partners for an account or payment of his share of the property or profits of the firm, save when severing his connection with the firm, and in such case the amount of his share shall be determined by a valuation made as far as possible in accordance with the rules contained in section 43 :

Provided that all the partners acting together or any partner entitled to dissolve the firm upon notice to other partners may elect in such suit to dissolve the firm, and thereupon the Court shall proceed with the suit as one for dissolution and for settling accounts between the partners, and the amount of the share of the minor shall be determined alongwith the shares of the partners.

(5) At any time within six months of his attaining majority, or of his obtaining knowledge that he had been admitted to the benefits of partnership whichever date is later such person may give public notice that he has elected to become or that he has elected not to become a partner in the firm and such notice shall determine his position as regards the firm :

Provided that, if he fails to give such notice, he shall become a partner in the firm on the expiry of the said six months.

(6) Where any person has been admitted as a minor to the benefits of partnership in a firm, the burden of proving the fact that such person had a knowledge of such admission until a particular date after the expiry of six months of his attaining majority shall lie on the persons asserting that fact.

(7) Where such person becomes a partner,—

(a) his rights and liabilities as a minor continue up to the

46. Lindley on partnership, 11th ed., p. 427 ; Quoted with approval in Hafiz Mohd. Sayeed v. Hakim Haji Abdul Hamid, A. I. R. 1964 Punj. 218, at p. 219.

date on which he becomes a partner, but he also becomes personally liable to third parties for all acts of the firm done since he was admitted to the benefits of partnership, and

(b) his share in the property and profits of the firm shall be the share to which he was entitled as a minor.

(8) Where such person elects not to become a partner,—

(a) his rights and liabilities shall continue to be those of a minor under this section up to the date on which he gives public notice,

(b) his share shall not be liable for any acts of the firm done after the date of the notice, and

(c) he shall be entitled to sue the partners for his share of the property and profits in accordance with sub-section (4).

(8) Nothing in sub-sections (7) and (8) shall affect the provisions of section 28.

Comments

We have noted above that to create partnership between a number of persons they must have entered into a contract to that effect,[47] and that the relation of partnership arises from contract and not from status.[48] That obviously implies that all the essentials of a valid contract are to be satisfied and, therefore, all the partners must be competent to contract. A minor is incompetent to contract, his agreement is void and, therefore, he is incapable of becoming a partner in any partnership firm.[49] If, while creating partnership, a minor is made a full-fledged partner in a parter-ship firm, the deed would be invalid and the document cannot be enforced even vis-a-vis other partners.[50]

Sub-Sec. (1)

Although an agreement by a minor is void yet he is capable of accepting benefits. This section, therefore, provides that a minor may not be a partner in a firm, but with the consent of all the partners for the time being he may be admitted to the benefits of partnership. The introduction of a minor to the benefits of partnership pre-supposes existence of a valid partnership between persons competent to contract. There can be no partnership of all

47. Sec. 4.
48. Sec. 5.
49. See secs. 10 and 11, Indian Contract Act and Commissioner of Income tax, Bombay v. Dwarkadas Khetan & Co., 1961 S. C. 680 (1961) 2 S. C. R. 821.
50. Dharam Vir v. Jagan Nath, A. I. R. 1968 Punj. 84. Also see Durga Charan v. Akkari Das, A. I. R. 1949 Cal. 617.

minors, but a partnership between persons competent to contract must exist before a minor can be admitted to its benefits.[51]

In *Lachhmi Narain* v. *Beni Ram*,[52] two persons entered into partnership in 1900 under the style Beni Ram Hoti Lal. Hotilal died in 1920 and thereafter Beni Ram continued the business under the old name and style with the partnership funds. Hotilal's minor son (the plaintiff) alleged that after his father's death he was admitted to the benefits of partnership.

Held that the plaintiff (minor) could not be admitted to the benefit of partnership as no partnership existed after the death of Hotilal. Moreover the plaintiff being a minor could not enter into a contract with Beni Ram to form partnership.

It is possible that the major members decide to constitute partnership and admit the minors to the benefits of the said partnership.[53] A guardian is capable of accepting benefits on behalf of a minor.[54] Admission of a minor to the benefits of partnership can be done only with the consent of all the partners.

Sub-Secs. (2), (3) and (4)

The minor thus admitted has a right to such share of the property and of the profits of the firm as may be agreed upon.[55] He however, cannot go to the court of law to enforce his rights in respect of such share so long as he continues admitted to the benefits of partnership. This disability is removed when he is severing his connection with the firm.[56] He can also have access to any of the accounts of the firm and can inspect and copy them.[57] In this matter his position is different from a partner of the firm. A partner has a right to have access to and to inspect and copy any of the *books* of the firm[58] whereas a minor's right has been limited to *accounts* only. It was considered dangerous to allow a person other than a real partner to have access to the secrets of the firm.

Every partner is jointly and severally liable for all acts of the firm. Moreover his liability is unlimited and can extend to his personal property. A minor, on the other hand, is not personally liable for any such act. It is only his share which is liable for the acts of the firm.[59]

51. Shriram v. Gouri Shankar, A. I. R. 1961 Bom. 136.
52. A. I. R. (1931) All. 327. Also See Haji Hedayatulla v. Mahomed Kamil, A. I. R. (1924) P. C. 93.
53. The Commissioner of Income-tax, Mysore v. Shah Mohandas, A.I.R. 1966 S. C. 15.
54. Ibid., at p. 17.
55. Sec. 30 (2).
56. Sec. 30 (4).
57. Sec.30 (2).
58. Sec. 12 (d).
59. Sec. 30 (3).

Sub-Sec. (5)—Option on attaining majority

At any time within six months of his attaining majority or of obtaining knowledge that he had been admitted to the benefits of partnership, whichever date is later, he can elect to become or not to become a partner, such option is exercised by giving a public notice under S. 72 of the Act. If he remains silent and fails to give such a notice there is a presumption that he wants to be a partner and on the expiry of the said six months he shall become a partner in the firm.

Sub-Sec. (6)

Sub-Sec. (5) contemplates that the guardian may have accepted the benefits of a partnership on behalf of a minor without his knowledge.[60]

Sometimes the minor may remain ignorant of his admission to the benefits of partnership even after he has attained majority. According to Sub-Sec. 6) the burden of proving the fact that such person had no knowledge of such admission until a particular date after the expiry of six months of his attaining majority shall lie upon the person asserting that fact. The Act, however, is silent as to who will have to prove that the minor obtained the knowledge of his admission after he attained majority but before the said period of six months from that date expired. Such cases would presumably be decided by the general rule contained in Sec. 101, Indian Evidence Act.

Sub-Sec. (7)—His position if he becomes a partner

We have seen above that such a minor becomes a partner in the firm—

(i) when he himself elects to become a partner, or

(ii) fails to give the required public notice of his intention to become or not to become a partner within the specified time.

So far as his rights and liabilities vis-a-vis partners of the firm are concerned they continue to be the same upto the date on which he becomes a partner. Moreover his share in the property and profits of the firm shall be the same to which he was entitled as a minor.

Towards the creditors of the firm he becomes personally liable for all the acts of the firm not from the date of his attaining majority, not from the date of his becoming a partner but retrospectively from the date of his admission to the benefits of partnership. His position under English law is different and there

60. The Commissioner of Incometax, Mysore v. Shah Mohandas, A. I. R. 1966 S. C. 15, at p. 17.

his liability does not extend retrospectively from the date of his admission to the benefits of partnersnip, but is only from the date of his attaining majority.[61]

Sub-Sec. (8)—His position when he elects not to become a partner

Whe he elects not to become a partner, his rights and liabilities continue to be the same as that of a minor upto the date of his giving public notice. His liability as regards his share in the firm continues only up to the date of the notice. Thereafter, neither his share in the firm is liable, nor there arises any question of his personal liability.

Sub-Sec. (9)

If, however, after attaining majority he represents or knowingly permits himself to be represented as a partner in the firm, his liability on the ground of holding out can still be there.

61. Code and Bennion v. Harrison 5 Barn. & Ald. 147 : 24 R. R. 307.

CHAPTER V

INCOMING AND OUTGOING PARTNERS

Introduction

This chapter deals with the change in the contitution of the firm either when a new partner is introduced or an old partner leaves the firm.

Introduction of a new Partner.—A new partner may be admitted to the firm in the following ways :—

1. With the consent of all the existing partners.

2. In accordance with a contract between the partners. For example, if the partners have already agreed that one of them can nominate his son as a partner then the introduction of such a partner is possible in accordance with the abovestated contract, *i. e.*, by nomination.

3. A minor who had been admitted to the benefits of partnership on attaining majority may elect to become a partner and he thereby becomes a partner as provided in Sec. 30 (5). If the minor on attaining majority does not exercise his option within a period of six months of his attaining majority or obtaining the knowledge that he had been admitted to the benefits of the partnership firm, then on the expiry of such period he automatically becomes a partner.

A person who is introduced as a partner into the firm becomes liable for all acts of the firm from the date of his admission. He is not liable for the acts done prior to his admission. However, a person who was admitted to the benefits of partnership as a minor and becomes a partner on attaining majority, he becomes liable for all acts of the firm done since the date of his admission to the benefits of partnership.

A persons may cease to be a partner in the following ways :—

1. By retirement,
2. By expulsion,
3. By insolvency,
4. By death.

1. Retirement of a partner

Retirement means voluntary withdrawal of a partner from the firm. A partner may retire in the following ways :—

(i) **With the consent of all the other partners.**—When a person became a partner with others, he cannot be allowed to withdraw from the firm at his sweet will as there is a possibility of the whole business being dislocated. If, however, all the partners agree, anyone of them may retire with their consent. Such consent may be express or implied.

(ii) **In accordance with express agreement between the partners.**—The partners in their agreement may have provided for some procedure in accordance with which the retirement of a partner could possibly be there. For example, if the agreement provides that a partner could retire when majority of the other partners give their permission for the same, retirement in accordance with this contract can be there.

(iii) **In a partnership at will a notice to others.**—If the partnership is not for a fixed term but is at will, as explained in sec. 7 of the Act, any partner can retire by giving a notice in writing to all the other partners of his intention to retire.

Liability of a retiring partner for acts done before his retirement :

According to sec. 25 every partner is liable for all acts of the firm done while he is a partner. Therefore, if a partner retires today he has already become liable for the acts of the firm which have been done till today and he continues to be liable for such acts done prior to his retirement inspite of his retirement. Section 32 (2) provides a procedure whereby the retiring partner may be discharged from such liability which would otherwise be there. The procedure suggested is a *novation*. That meas an agreement between the three parties *i. e.*, the outgoing partner, willing to be discharged from his liability, the continuing partners agreeing to undertake the liability of the outgoing partner also and the creditors, giving their consent to this change. In *Evans* v. *Drummond* the two partners A and B executed a bill in favour of X. Thereafter A retired and on the due date B did not pay the bill but gave another bill to X in exchange for this bill and this new bill was signed only by B. It was held that by accepting the bill signed only by B, X had agreed to discharge A from liability.

Liability of the retiring partner for acts done after retirement :

Although by retirement a partner ceases to be a partner but his liability for the acts of the firm done after retirement still continues until a public notice of retirement has been given. The reason is that while such a person was a partner there was mutual agency between the partners. But when the mutual agency comes to an end a third party, who does not know of this change, can presume that such mutual agency still continues to be there. It is,

therefore, in the interest of the retiring partner as well as the continuing partners that a public notice of retirement is given. Such a notice may be given either by the retired partner or by any member of the re-constituted firm. A public notice, however, is not needed to be given by a person who was not known to be a partner to third parties because proviso to Sec. 32 (3) says that a retired partner is not liable to any third party who deals with the firm without knowing that he was a partner.

2. Expulsion of a partner

Expulsion means making a partner to leave the firm when he is unwilling to go out. Sec. 33 provides that no majority of the partners can expel a partner unless the following two conditions are satisfied :—

(i) The power to expel has been conferred by a contract between the partners, and

(ii) Such power has been exercised in good faith.

If the expulsion is not in good faith it would be void and the expelled partner can claim to be reinstated. In *Blisset* v. *Daniel* one partner opposed the appointment of another partner's son as a manager in the firm and he was expelled. It was held that such expulsion was void. But if a partner is found to be travelling without ticket and he has been found guilty of this offence, expulsion of such a partner has been considered to be in the interest of the firm and held to be justified (*Carmichael* v. *Evans*).

The position of an expelled partner for the acts done by the firm before and after his expulsion, is exactly the same as that of a retired partner. It means that generally he would be liable for acts done while he was a partner. His liability for acts done after expulsion can be avoided by giving a public notice of his expulsion.

3. Insolvency of a partner

According to sec. 34 when a partner of a firm is adjudicated insolvent, he ceases to be a partner. It is possible that when one partner ceases to be a partner because of his insolvency the other partners may continue the business of the firm. The estate of such insolvent partner is not liable for any act of the firm done after the date of his insolvency. In case of such a partner the need for a public notice is not there because the fact of insolvency is deemed to have come to the notice of all those who are interested in his credit.

4. Death of a partner

On the death of a partner the firm may not be dissolved and other partners may continue the business. The position of the estate of a deceased partner is the same as that of an insolvent

partner. His estate cannot be made liable for acts of the firm done after his death (Sec. 35).

Rights of an outgoing partner

Sections 36 and 37 confer the following rights on an outgoing partner :—

1. Right to carry on a competing business.

An outgoing partner may carry on a competing business with that of the firm but he is not allowed to use the firm name or represent himself to be carrying on the business of the firm or solicit the custom of persons who were dealing with the firm before he ceased to be a partner.

This is subject to contract between the partners to the contrary.

An outgoing partner may make an agreement with his co-partners that on ceasing to be a partner he will not carry on any business similar to that of the firm within a specified period or within specified local limits. Although the agreement in restraint of trade is void under sec. 27 of the Contract Act but abovestated agreement between the outgoing partner and the other partner has been declared to be valid by sec. 36 (2) of the Act.

2. Right to share profits subsequent to leaving the firm.

When share of the property of an outgoing partner is not paid to him immediately but that continues to be used in the firm by the remaining partners, the outgoing partner or his estate are entitled :—

Either (i) to such share of the profits made since he ceased to be a partner as may be attributable to the use of his share of the property of the firm, or (ii) to an interest at the rate of 6 per cent per annum on the amount of his share in the property of the firm.

If the surviving or the continuing partners agree to purchase the share of the outgoing partner then he is not entitled to the benefit discussed above.

Sec. 38 of the Act provides that when there is a change in the constitution of the firm *i. e.*, when a new partner is introduced or an existing partner ceases to be a partner, a continuing guarantee given to the firm or to a third party in respect of the transaction of the firm is revoked as to future transactions, unless there is an agreement to the contrary. In case of *N. C. Mukerjee* v. *B. D. Mukerjee* there was a change in the constitution of the firm and it was held that the surety was discharged as to future transactions in respect of a continuing guarantee given by him for the conduct of the cashier of the firm.

INCOMING AND OUTGOING PARTNERS

31. Introduction of a partner.– (1) Subject to contract between the partners and to the provisions of section 30, no person shall be introduced as a partner into a firm without the consent of all the existing partners.

(2) Subject to the provisions of section 30, a porson who is introduced as a partner into a firm does not thereby become liable for any act of the firm done before he became a partner.

Comments

Sub-Sec. (1)

A new partner can be introduced into a firm in the following ways :—

(1) With the consent of all the existing partners ;

(2) In accordance with a contract between the partners ;

(3) In accordance with the provisions of sec. 30.

(1) Introduction with the consent of tbe partners

The relationship between the partner is based upon mutual confidence and trust. For the harmonious working of a partnership it becomes necessary that a new partner should not be introduced without the consent of all the partners. This section, therefore, provides the general rule that no person shall be introduced as a partner into the firm without the consent of all the existing partners.

(2) Introduction in accordance with a contract between the partners

The rule stated above is subject to contract between the partners. If a prior contract between the partners permits the introduction of a new partner even without the consent of all the existing partners that can possibly by done. For example, the contract provides that majority of the partners shall be competent to admit a new partner or any one of them may nominate a partner to appoint his successor, a new partner could be introduced accordingly.

In such cases even if some of the partners are unwilling to the introduction of some particular person, they will be bound by their contract and the introdution will be valid. The position as explained in *Lovegrove* v. *Nelson*[1] is : "To make a person a partner with 2 others, their consent must clearly be had, but there is no particular mode or time required for giving that consent ; and if three enter into partnership by a contract which provides that, on one retiring one of the remaining two, or even a fourth person, who is no partner at all, shall name the successor to take the share of one retiring, it is clear that this would be a valid contract which the court must recognise and the new partner would come in as entirely by the consent of the other two, as if they had adopted him by name."

1. (1834) 3 My & K. 1, 20 ; 41 R. R. 1, 2.

In *Byrne* v. *Reid*'[2] A, B, C and D were four partners and they, in their partnership deed, authorised A to admit his son, S into partnership when S had attained the age of twentyone years. When S attained the age of twenty-one years A nominated him as a partner in accordance with the partnership deed and he accepted the nomination, but the other partners refused to recognise him as a partner. It was held that the son on accepting the nomination had become a partner. The nominee in such cases is not bound to become a partner but he has the option to do so or not.[3]

It may be mentioned that in order that a person becomes a partner he himself also must have consented to that. The nominee becomes a partner, when after nomination, he expressly or impliedly, agrees to the same.[4]

(3) A minor admitted to the benefits of partnership becoming a partner

A minor admited to the benefits of partnership can become a partner according to the procedure mentioned in section 30 (5). When a minor was admitted to the benefits of partnership, he may make an election, within 6 months of his attaining the majority or obtaining knowledge that he had been admitted to the benefits of partnership, whichever date is later, and give a public notice whether he becomes a partner or not. If he opts to become a partner by such notice, he becomes a partner of the firm. If he fails to give such notice within the abovestated time, then on the expiry of such time, he automatically becomes a partner.

Sub-Sec. (2)—His Liability

It has already been observed that according to section 25 : "Every partner is liable.....for all the act of the firm done while he is a partner." This sub-section confirm this rule and states that an incoming partner "does not thereby become liable for any act of the firm done before he became a partner". It is clear that as a general rule the liability of an incoming partner begins from the date of his joining the firm.

Nothing can, however, prevent a partner from agreeing to be liable for the acts done before his admission. If he makes such an agreement with his co-partners the same will be binding only between him and the co-partners and the third parties cannot take advantage of such an agreement. The creditors can make him liable if they can show that the incoming partner had agreed with them, expressly or impliedly, for being liable towards them for the debts incurred before his admission. The basis of liability for

2. (190) 2 Ch. 735 ; Also see Page v. Cox 10 Hare 163 ; Wainwright v. Watetman 1 Ves. Jun. 311 ; Milliken v. Milliken, 8 Ir. Eq. 16.
3. Pigott v. Bagley, Mc Cl. & Y. 569 ; Madgwick v. Wimble, 6 Beav. 495 ; Page v. Cox 10 Hare 163
4. Mulchand v. Manekchand (1906) 8 Bom. L. R. 8.

the past acts, in such a case, will be the agreement rather that the fact of his admission as a partner.

The position of a minor becoming a partner under sec. 30 is, however, different. His liability towards third parties does not commence from the date of his becoming a partner, but, it relates back to the date of his admission to the benefits of partnership.[5]

32. Retirement of a partner.—(1) A partner may retire—

(a) with the consent of all the other partners,

(b) in accordance with an express agreement by the partners, or

(c) whether the partnership is at will, by giving notice in writing to all the other partners of his intention to retire.

(2) A retiring partner may be discharged from any liability to any third party for acts of the firm done before his retirement by an agreement made by him with such third party and the partners of the reconstituted firm and such agreement may be implied by a course of dealing between such third party and the reconstituted firm after he had knowledge of the retirement.

(3) Notwithstanding the retirement of a partner from a firm, he and the partners continue to be liable as partners to third parties for any act done by any of them which would have been an act of the firm if done before the retirement, until public notice is given of the retirement :

Provided that a retired partner is not liable to any third party who deals with the firm without knowing that he was a partner.

(4) Notices under sub-section (3) may be given by the retired partner or by any partner of the reconstituted firm.

Comments

Retirement of a partner

Retirement here means voluntary withdrawal of a partner from the firm. It covers cases where a partner retires but the firm is not dissolved and it continues with the remaining partners. If a partner withdraws from the firm by dissolving it, it is dissolution of the firm rather than retirement of a partner.

Sub-Sec. (1)—How can partner retire ?

A partner may retire in the following ways :

(1) With the consent of all the other partners.—As a general rule no partner can retire whenever he likes. The partnership

5. S. 30 (7) (a).

business depends upon the continued support from all the partners. The retirement of a partner might mean a serious dislocation of the whole business. A partner can, therefore, retire with the consent of all the other partners. Such consent may be express or implied.

(2) In accordance with express agreement by the partners.—In case the agreement between the partners themselves condones the requirement of the consent of them all, a partner may retire accordingly. For instance, the partneship deed provides that a partner may retire with the consent of the majority of other partners or by giving one year's notice, a partner can retire in accordance with such an agreement.

(3) In Partnership at will by a notice to others.—In case of partnership at will,[6] a partner may retire by giving a notice in writing to all the other partners of his intention to retire. When it is partnership at will a partner has a right either to retire or even to dissolve the firm[7] by giving a notice to the others partners to that effect.

The English law is stricter, so far as a partner's right to retire is concerned. There is only one method by which a partner can retire from a firm without the consent of his co-partners, and that is, by dissolving the firm.[8]

His position after retirement.—The question arises regarding his liability for the acts of the firm done :—

(1) Before his retirement

(2) After his retirement.

(1) Sub-Sec. (2) - Liability for acts done before his retirement.

Every partner is liable for all acts of the firm done while he is a partner.[9] If liability has arisen during the period while a person was a partner, such liability does not come to an end by his retirement. He may, however, be discharged from such liability by what is known as *Novation*. Novation means substitution, with the creditor's consent, of a new debtor for an old one. This is done by substituting a new contract in place of an old one, thereby discharging the liability of the original debtor and creating that of a new one in his place. It is essential that the creditor must agree to such a substitution. In partnership when the creditor accepts the security of continuing partners in discharge of that of the former partners, the outgoing partner is thereby discharged from his liability towards such creditor. Sub-sec. (2) requires that for the proper discharge of the retiring partner from

6. See sec. 7.
7. See sec. 43.
8. Lindley on Partnership, 12th Ed. p. 598.
9. See sec. 25.

liability there should be contract between all the three parties *viz.* the outgoing partner, the members of the reconstituted firm and the creditor. Mere agreement between the outgoing and the continuing partners that only the continuing partners will be liable for all the past acts does not discharge the outgoing partner from his liability towards the creditor. The concurrence of the creditor also must be there to such a contract. Such an agreement need not always be express, it may be implied by a course of dealing between such third party (creditor) and the reconstituted firm after he had the knowledge of the retirement.

In *Evans* v. *Drummond*[10] A and B, the two partners in a firm executed a bill in favour of the creditor X. A retired and thereafter on the due date the bill was not paid to X but a new bill signed only by B was given to X, who fully knew of the change in the firm. If was held that by accepting the new bill signed only by the continuing partner, the creditor had relied on his sole security, and had discharged the retiring partner from liability.

(2) Sub-Sec. (3)— Liability for the acts done after his retirement.

By retirement a person ceases to be a partner. The third parties can still presume mutual agency between the outgoing and the continuing partners, until a public notice of retirement is given. In the absence of a public notice the outgoing partner and the continuing partners continue to be liable for the act of each other towards third parties. In order to avoid such liability it is in the interest of both the retiring and the continuing partners that public notice is given. It has, therefore, been provided in sub-sec. (4) that such a notice may be given either by the retired partner or any partner of the reconstituted firm.

The liability stated above which arises in the absence of public notice is nothing but the application of the doctrine of holding out. There is a presumption that a person who was known to be a partner continues to be so known to the third parties until the notice of retirement is given.

The principle was thus explained in *Scarf* v. *Jardine*[11] :

"The principle of law, which is stated in Lindley on Partnership[12] is inconvertible, namely, that 'when an ostensible partner retires, or when a partnership between several known partners is dissolved, those who dealt with the firm before a change took place are entitled to assume, until they have notice to the contrary, that no change has occurred ; and the principle on which they are entitled to assume is that of the estoppel of a person who

10. 4 Esp. 89 : Reed v. White 5 Esp. is also a decision to the same effect.
11. (1882) 7 A. C. 345. Lord Selborne at pp. 349, 350.
12. Also see Lindley on Partnership, 12th Ed. p. 262.

has accredited another as his known agent from denying that agency at a subsequent time as against the persons to whom he has accredited him, by reason of any secret revocation.' Of course in partnership there is agency—one partner is agent of another ; and in the case of those who under the direction of the partners for the time being carry on the business according to the ordinary course, where a man has established such an agency, and has held it out to others, they have a right to assume that it continues until they have notice to the contrary."

Dormant Partner

If a dormant partner (i. e. a person who is not known to be a partner), retires, he is not liable for the acts of the firm done after his retirement even though no notice of retirement has been given.[13]

Proviso to sec. 32 (3) states that "a retired partner is not liable to any third party who deals with the firm without knowing that he was a partner."

The basis of the liability of the retired partner after his retirement as seen above, is that the creditor still believing him to be a partner gives credit to the firm. There is, obviously, no need of applying that principle to a partner who is not known to be one. The case of *Tower Cabinet Co., Ltd.* v. *Ingram*[14] explains this point. In that case Ingram and Christmas were partners in a firm known as Merry's. The partnership was dissolved but Christmas carried on the business in the same firm name. Public notice of the dissolution of the firm was not given. Christmas placed an order, on the old notepaper bearing the names of both Ingram and Christmas, with Tower Cabinet Co. It was held that Ingram was not liable as Tower Cabinet Company had no knowledge that Ingram was a partner before the date of dissolution. The mere fact that the retiring partner did not see to the destruction of the old notepapers bearing his name could not make him liable to the creditors with whom communications were made on one such notepaper.

The proviso protects the dormant partner from liability towards such third parties who did not know him to be a partner. If a third party had the knowledge of such person being a partner but had no notice of his retirement, the proviso does not bar him from bringing an action even against such person who is generally not known to be a partner.

33. Expulsion of a partner.—(1) A partner may not be expel-

13. See Carter v. Whalley 1 B. & Ad. 11, Heath v. Sansom 4 B. & Ad. 172; Evans v. Drummond 4 Esp. 89; Juggilal Kamlapat v. Sew Chand (1960) Cal. 463; Tower Cab. Co. v. Ingram (1949) All. E. R. 1033.

14. (1949) 2 K. B. 397 ; Refer also to Juggilal Kamlapat v. Sew Chand Bagree (1960) Cal. 463: Proviso to sec. 45 (1) also states a similar rule when there is a dissolution of the firm.

led from a firm by any majority of the partners, save in the exercise in good faith of powers conferred by contract between the partners.

(2) The provisions of sub-sections (2), (3) and (4) of section 32 shall apply to an expelled partner as if he were a retired partner.

Comments

This section provides the general rule that a partner cannot be expelled from the firm by any majority of the partners. Expulsion of a partner is possible, in exceptional cases, when the following two conditions are there :

1. The power to expel has been conferred by a contract between the partners, and

2. Such a power has been exercised in good faith.

No expulsion is possible unless a power to that effect has been conferred by a contract. This power must be exercised in good faith for the general interest of the whole firm. If the expulsion is *mala fide* the same is void. In *Blisset* v. *Daniel*[15], wothirds majority of the partners, having been conferred witht the power to expel, expelled one partner. It was found that the real reason for the expulsion was that the said partner had opposed the appointment of a co-partner's son as a co-manager with his father. It was held that the expulsion was void.

Explusion of a partner, who has been held guilty of an offence, has been considered to be justified. In *Carmichael* v. *Evans*,[16] the power to expel existed against any partner who was addicted to scandalous conduct detrimental to the partnership business or was guilty of any flagrant breach of duties relating to partnership business. One of the partners was convicted for travelling without ticket and he was given a notice of the expulsion by the other partners. It was held that the notice of expulsion given under these circumstances was justisfied.

As regards liability towards third parties for acts of the firm done either before or after expulsion the position of the expelled partner is exactly the same as that of a retired partner. It means that as a general rule he continues to be liable for the acts which were done while he was a partner, but for the acts done after his expulsion he can be made liable unless a public notice of expulson has been given.

34. Insolvency of a partner.— (1) Where a partner in a firm is adjudicated an insolvent he ceases to be a partner on the date

15. (1853) 10 Hare 493 : 90 R. R. 454; Also see Wood v. Wood, (1874) L. R. Ex, 190.
16. (1904) 1 Ch. 486.

on which the order of adjudication is made, whether or not the firm is thereby dissolved.

(2) Where under a contract between the partners the firm is not dissolved by the adjudication of a partner as an insolvent, the estate of a partner so adjudicated is not liable for any act of the firm and the firm is not liable for any act of the insolvent, done after the date on which the order of adjudication is made.

Comments

Sub-sec. (1).—A person who is adjudicated insolvent is not allowed to continue as partner and, therefore, he ceases to be a partner on the date on which order of adjudication is made. Whether on adjudication of a partner as insolvent the firm is also dissolved or not depends upon the contract between the partners. According to sec. 42 (d), unless the partners agree otherwise, a firm is dissolved by the adjudication of a partner as insolvent.

Sub-sec. (2).—Where the firm is not dissolved on the adjudication of a partner as insolvent and the other partners agree to continue the business, the estate of the insolvent partner is not liable for an act of the firm after the date of adjudication. In his case he is absolved from liability for future acts even though no public notice of his being adjudicated insolvent is given. His position is, therefore, different from the retired or the expelled partner, whose liability for the acts of the firm continues unless a public notice of retirement or expulsion is given. The reason why such a notice has been dispensed with is that insolvency is itself a notorious fact which is not required to any body.

35. Liability of estate of deceased partner.—Where under a contract between the partners the firm is not dissolved by the death of a partner the estate of a deceased partner is not liable for any act of the firm done after his death.

Comments

Although on the death of a partner a firm is dissolved but, if the other partners so agree, the firm may not be dissolved[17] and the business of the firm may be continued with the remaining partners. The position on the death of a partner is similar to that which has been noted in the previous section regarding an insolvent partner. No public notice is required to be given on the death of a partner also and the estate of a deceased partner is not liable for any act of the firm done after his death.

36. Rights of outgoing partner to carry on competing business.—(1) An outgoing partner may carry on a business competing with that of the firm and he may advertise such

17. Sec. 42 (c).

business, but, subject to contract to the contrarty, he may not—

(a) use the firm name,

(b) represent himself as carrying on the business of the firm, or

(c) solicit the custom of persons who were dealing with the firm before he ceased to be a partner.

(**2**) **Agreements in restraint of trade.**—A partner may make an agreement with his partners that on ceasing to be a partner he will not carry on any business similar to that of the firm within a specified period or within specified local limits ; and notwithstanding anything contained in section 27 of the Indian Contract Act, 1872, such agreement shall be valid if the restrictions imposed are reasonable.

Comments

Sub-sec. (1).—This Section deals with the right of the outgoing partner with regard to some other business which he may like to carry on. Sub-sec. (1) states that an outgoing partner, whether he leaves the firm by retirement, expulsion or insolvency, has a right to carry on a business competing with that of the firm. He may also advertise such business. This right to carry on the competing business is, however, subject to three restrictions :

1. He cannot use the name of the firm for his business.

2. He cannot represent himself as carrying on the business of the firm. After he goes out he severs his connection with the firm and, therefore, he is not allowed to mislead the public by misrepresenting that he is still carrying on the firm's business.

3. He cannot solicit the custom of persons who were dealing with the firm. He cannot approach the old customers to persuade them to be diverted towards his busines. It has been noted above that he can advertise his own business and if the old customers themseves prefer to come to him there is no bar to his attending to them.

The abovestated restrictions on the outgoing partner are necessary to protect the interest of the firm which he leaves. The restrictions are similar to those which are imposed on a person who sells the goodwill of his business. When a partner leaves the firm he gets his share of the assets. Such share generally includes payment for his share of the goodwill also. Outgoing partner is presumed to have sold the goodwill to the remaining partners and, therefore, restrictions as stated above are applicable to him. These restrictions are subject to contract between the outgoing and the other partners. The provision contained in this sub-section is similar to the one contained in sec. 55 (2), where the goodwill of a firm is sold on the dissolution of a firm.

Sub-sec. (2).—This sub-sec. permits an agreement being made between the outgoing partner and the continuing partners whereby the outgoing partner be restrained from carrying on business similar to that of the firm. Such an agreement has been declared to be valid and constitutes an exception to the rule contained in sec. 27, Indian Contract Act, which declares an agreement in restraint of trade as void. It is, however, necessary that :

(i) The agreement restraining the outgoing partner from carrying on a similar business should stipulate that such a business will not be carried on for a specified period or within specified local limits, and

(ii) The restrictions imposed should be reasonable.

37. Rights of outgoing partner in certain cases to share subsequent profits.—Where any member of a firm has died or otherwise ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with the property of the firm without any final settlement of accounts as between them and the outgoing partner or his estate, then, in the absence of a contract to the contrary, the outgoing partner or his estate is entitled, at the option of himself or his representatives, to such share of the profits made since he ceased to be a partner as may be attributable to the use of his share of the property of the firm or to interest at the rate of six per cent per annum on the amount of his share in the property of the firm :

Provided that where by contract between the partners an option is given to surviving or continuing partners to purchase the interest of a deceased, or outgoing partner, and that option is duly exercised, the estate of the deceased partner, or the outgoing partner or his estate, as the case may be, is not entitled to any further or other share of profits ; but if any partner, assuming to act in exercise of the option, does not in all material respects comply with the terms thereof he is liable to account under the foregoing provisions of this section.

Comments

When a partner ceases to be a partner by retirement, expulsion, insolvency or death his share in the property of the firm may not be immediately paid to him and the firm may continue the business without any final settlement of accounts between the outgoing partner or his estate and the others. This section gives an option to the outgoing partner or the representative of the deceased partner, who has not been paid his share of the property.

either (i) to claim such share of the profits made since he ceased to be a partner as may be attributable to the use of his share of the property of the firm,

or, (ii) to claim an interest at the rate of 6% per annum on

the amount of his share in the property of the firm.

This is subject to the contract between the partners to the contrary.

The abovestated option can be exercised by the outgoing partner or on behalf of the deceased partner when subsequently the profits are calculated. He can then exercise this option the way he finds the same to be more beneficial to him. But once the option is made it becomes binding on the person making it.

Where by a contract between the partners the surviving or the continuing partners purchase the share of the outgoing or the deceased partner, the right of sharing profits as discussed above is lost. If, however, the partner who was to purchase such share of the outgoing or the deceased partner does not comply with the terms of the contract of purchase in all material respects, he is liable to account for the right of the outgoing or the deceased partner as stated above.

38. Revocation of continuing guarantee by change in firm.— A continuing guarantee given to a firm, or to a third party in respect of the transactions of a firm, is, in the absence of agreement to the contrary, revoked as to future transactions from the date of any change in the constitution of the firm.

Comments

If there is a change in the constitution of the firm either by the introduction of a new partner to the firm or by a partner ceasing to be one, any continuing guarantee, given to the firm or to the third party in respect of the transaction of the firm, is automatically revoked as to future transactions unless there is an agreement to the contrary. The basis of the rule is that when there is continuing guarantee given to the firm or to the third party by the firm that is always with the assumption that the same persons who are partners at the time of such guarantee shall continue to be there for the whole period of such guarantee. Therefore, such a guarantee continues to be operative so long as there is no change in the constitution of the firm, but upon such a change the guarantee is revoked as regards future transactions. This point can be explained by refering to the case of *Neel Comul Mookerjee* v. *Bipro Das Mookerjee*.[18] In that case a guarantee was given for the conduct of the cashier of the firm known as "N. C. Mookerjee". Subsequently, there was a change in the constitution of the firm and its name was also changed to "N. Mookerji & Son". It was held that on this change the guarantee was revoked and the surety was not liable for the conduct of the cashier subsequent to such change.

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18. (1901) 28 Cal. 597.

CHAPTER VI

DISSOLUTION OF A FIRM

Introduction

Dissolution means coming to an end of the relation of partnership between various partners. When there is dissolution of partnership between all the partners it is known as dissolution of the firm. A firm may be dissolved in the following ways :—

1. Dissolution with the consent of all the partners (Sec. 40) :

As all the partners could create partnership by their mutual agreement, they can similarly dissolve the firm by making an agreement to that effect.

2. Dissolution in accordance with a contract between the partners (Sec. 40) :

There may be a previous contract between the partners mentioning the circumstances or the procedure for the dissolution of the firm, the firm may be dissolved in accordance with such a contract.

3. Dissolution by a notice when the partnership is at will (Sec. 43):

When the partnership is a partnership at will, as defined in sec. 7, *i. e.*, that the firm was not constituted for a fixed term, such a firm may be dissolved by a notice in writing by any partner to all the other partners indicating his intention to dissolve the firm. The firm stands dissolved from the date mentioned in the notice. If the notice does not mention any date, the dissolution takes effect from the date of communication of the notice.

4. Compulsory dissolution (Sec. 41) :

On the happening of the following events there is compulsory dissolution of the firm :—

(i) By the adjudication of all the partners or all except one as insolvent the firm is compulsorily dissolved. When a partner is adjudicated as insolvent, he ceases to be a partner and, therefore, when all the partners or all except one are adjudicated insolvent they cease to be partners and there is no question of their continuing as partners. There has to be dissolution of the firm. The dissolution being compulsory, the partners cannot make the firm to continue by making an agreement to that effect.

(ii) When the business of the firm becomes unlawful there has to be compulsory dissolution of the firm. Similar-

ly, when it becomes unlawful for the partners to carry on the business in partnership then also the firm is compulsorily dissloved.

5. Dissolution on happening of certain contingencies (Sec. 42.) :

On the happening of the following events the firm is automatically dissolved unless there is a contract to the contrary :

(i) If the firm was constituted for a fixed term it stands dissolved on the expiry of that term.

(ii) If the firm was constituted to carry out certain adventures or undertakings, the firm is dissolved when those adventures or undertakings are completed.

(iii) When a partner dies there is dissolution of the firm.

(iv) A firm is also dissolved when a partner is adjudicated insolvent.

It has been noted above that the dissolution as contemplated in section 42 occurs unless there is contract to the contrary. It means that even if any one of the abovestated events happens the firm may not be dissolved if the partners are interested in continuing the business of the firm and they agree, expressly or impliedly, to that effect.

6. Dissolution by Court (Sec. 44) :

When only some of the partners are interested in the dissolution of the firm and others oppose it, the persons interested in dissolution can apply to the court and the court may order the dissolution of the firm. A suit for dissolution can be filed when one or the other of the following grounds are there :—

(a) When a partner becomes of unsound mind an application for dissolution may be made either on behalf of such a person or by any other partner.

(b) When a partner becomes permanently incapable of performing his duties, an application for dissolution could be made by any other partner.

(c) When a partner is guilty of some misconduct which is likely to affect prejudicially carrying on the business of the firm, the other partners can apply for the dissolution of the firm. Misconduct here may mean misconduct even towards a third party. For example, when a partner of a firm of bankers has been held guilty of misappropriation of funds, the other partners can apply for dissolution of the firm.

(d) When a partner makes a persistent breach of the partnership agreements any partner other than that partner

can apply for dissolution of the firm.

(e) When a partner transfers the whole of his interest in the firm to a third party or he has allowed his interest to be charged under the provisions of the Civil Procedure Code or he has allowed it to be sold in the recovery of the arrears of land revenue or some such dues, the other partners can apply for the dissolution of the firm.

(f) The object of the partners is to make and share profits and if there is no possibility of making profits but it appears that the business of the firm cannot be carried on except at a loss, any partner can apply to the court for the dissolution of the firm.

(g) The court is empowered to dissolve a firm on any other ground than as stated above if it appears to the court to be a just and equtiable ground for dissolution. For example, if the mutual confidence and trust between the partners is lost, an application or dissolution can be made. In *Abbot* v. *Crump* it has been held that when one partner commits adultery with the wife of another partner, it is a fit ground for the dissolution of the firm by the court.

Liability after dissolution.—By dissolution even though as between the partners the relationship comes to an end but from the point of view of the third parties the mutual agency between the partner continues unless steps are taken to make the third parties aware of the same. Sec. 45 provides that notwithstanding the dissolution of a firm, the partners continue to be liable as such to third parties for any act done by any of them, if such an act would have been act of the firm if done before dissolution, until public notice of the dissolution is given. Such a notice may by given by any partner.

No public notice is needed when a partner dies, or is adjudicated insolvent, or is one who is not known to be a partner to the third party dealing with the firm. The estate of the deceased or the insolvent partner, or the partner, who is not known to be so to the third party would not be liable for an act of the firm done after he ceases to be a partner even though no public notice has been given.

Winding up.

After there is dissolution of the firm winding up of the affairs of the firm has to be there. Winding up includes completion of the transaction begun but unfinished at the time of the dissolution, performing the contracts which have already been entered into, payment to the creditors of the firm, realising the debts due to the firm and, if necessary, filing suit for the same, disposing off the

assets of the firm and converting them into cash, and refund of capital to the partners. Although mutual agency for the purpose of carrying on the business of the firm comes to an end by the dissolution of the firm, but for the purpose of winding up mutual agency between the partners still exists until the affairs of the firm have been completely wound up. (Sec. 47).

Every partner has a right to see that there is proper winding up. On the dissolution of the firm every partner of his representative is entitled, as against all the other partners or their representatives, to have the property of the firm applied for the payment of the debts of the firm, and to have the surplus distributed among the partners or their representatives according to their rights. (Sec. 46). The payment of the debts of the firm out of joint assets is in the interest of all the partners, because if that is not done every partner remains exposed to the risk of being made liable to meet all such liabilities.

When the winding up is going on no partner can make any personal benefit by using the property of the firm, the name or the business connection of the firm. (Sec. 50). If any partner is making use of the firm name or using any property of the firm for his personal profit, the other partners or their representatives may obtain an injunction againt such a partner restraining him from doing that. (Sec. 53). If, however, a partner or his representative purchases the goodwill of the firm, he can make use of the firm name.

Settlement of accounts between partners (Sec. 48).

Losses arising on dissolution are to be shared equally. Loss includes any deficiency in capital as well.

When the firm is being wound up, the amount available is to be utilised, for making various payments, in the following order :

1. Making payment of the debts of the firm to the third parties ;

2. Making payment to the partners rateably in respect of advances given by them over and above capital contributed by them ;

3. Making payment to each partner rateably what is due to him on account of capital ;

4. The residue if any is deemed as profit and that is distributed among partners in their profit sharing ratio.

When there are joint and separate debts, the property of the firm or of partners is to be applied as under :

(i) The property of the firm shall be applied in the first instance in payment of the debts of the firm, and if there is any surplus, then the share of each partner

shall be applied in payment of his separate debts or paid to him.

(ii) The separate property of a partner shall be applied first for paying separate debts, and the surplus, if any, may be utilised for payment of the debt of the firm.

Return of premium on premature dissolution (Sec. 51)

A partner may have paid some premium to secure partnership in an existing firm and also to get the right of remaining a partner in the firm for a fixed term. If there is premature dissolution of the firm, the partner who paid the premium shall be entitled to re-payment of the premium or of such part thereof as may be reasonable, regard being had to the terms on which he became a partner and also the period for which he remained a partner. It may be noted that such a return is permissible when the partnership was for a fixed term. There is to be no refund if the partnership was at will.

Return of premium is not allowed in the following cases :

1. When the dissolution of the firm occurs due to the death of a partner.

2. When the dissolution is mainly due to the misconduct of the partner who had paid the premium.

3. When the dissolution is in pursuance of an agreement between the partners, but the agreement does not make any specific mention of the return of premium.

Rights of a partner rescinding the contract of partnership (Sec. 52)

When there is fraud or misrepresentation in a contract creating partnership between persons, the partner whose consent has been so obtained has a right to rescind the contract and withdraw from the firm. When the contract of partnership is thus avoided, the right of person so rescinding the contract are protected. He can claim compensation on ground of fraud under the law of torts. In addition to that :

1. He has a lien on, or a right of retention of, the surplus assets of the firm, after the debts of the firm have been paid, in respect of any sums paid by him as capital or purchasing the share in the firm.

2. He gets priority in recovery of any amount due to him in respect of payments made by him towards the debts of the firm, as he is deemed to be a creditor of the firm in respect of that amount.

3. He has a right to be indemnified by the partners guilty of fraud or misrepresentation against all the debts of the firm.

Right to carry on competing business after dissolution (Ss. 54 and 55)

On the dissolution of a firm the property of the firm is disposed off. Goodwill is one of the assets of the firm and the same may be sold alongwith other assets or separately. Where the goodwill of the firm is sold after dissolution, a partner may still carry on a business competing with that of the firm and may advertise such business. The partner or partners selling the goodwill cannot :

(i) use the name of the firm ;

(ii) represent that they are carrying on the business of that old firm of which the goodwill has been sold ;

(iii) solicit the custom of person who had been dealing with the firm prior to dissolution.

If, on or anticipation of the dissolution of a firm, or on the sale of goodwill of a firm, there is an agreement that the partners will not carry on any business similar to that of the firm within a specified period or within specific local limits such an agreement will be valid and can be enforced notwithstanding the rule contained in section 27, Indian Contract Act, that an agreement in restraint of trade is void.

Dissolution of a firm

39. Dissolution of a firm.—The dissolution of partnership between all the partners of a firm is called the "dissolution of the firm."

Comments

Dissolution of partnership means coming to an end of the relation, known as partnership, between persons. When one or more partners cease to be partner but others continue the business in partnership, there is dissolution of partnership between the outgoing partners on the one hand and remaining partners on the other. The remaining partners as between themselves still continue as partners. For example, when the firm consists of A, B and C and A retires, there is dissolution of partnership between A and others but partnership as between B and C is not dissolved. Dissolution of partnership between all the partners of the firm is known as dissolution of the firm. For example, when in the firm consisting of A, B and C all of them cease to be partners with one another there is dissolution of the firm.

40. Dissolution by agreement.—A firm may be dissolved with the consent of all the partners or in accordance with a contract between the partners.

Comments

Sections 40 to 44 contain various modes of the dissolution of

a firm. This section mentions two modes of dissolution of a firm :

(i) Dissolution with the consent of all the partners, and

(ii) Dissolution in accordance with a contract between the partners.

As partners can create partnership by making a contract as between themselves, they are also similarly free to end this relationship and thereby dissolve the firm by their mutual consent. When all the partners so agree they may dissolve the firm at any time they like.

Sometimes there may have been a contract between the partners indicating as to when and how a firm may be dissolved, a firm can be dissolved in accordance with such a contract.

41. Compulsory dissolution.—A firm is dissolved—

(a) by the adjudication of all the partners or of all the partners but one as insolvent, or

(b) by the happening of any event which makes it unlawful for the business of the firm to be carried on or for the partners to carry it on in partnership :

Provided that, where more than one separate adventure or undertaking is carried on by the firm, the illegality of one or more shall not of itself cause the dissolution of the firm in respect of its lawful adventures and undertakings.

Comments

This section mentions certain events on the happening of which there is compulsory dissolution of the firm. The dissolution is compulsory and if the partners want to continue in partnership by agreeing to the contrary they cannot possibly do that. Compulsory dissolution occurs under the following circumstances :

(1) When all the partners or all except one are adjudicated insovent the firm is compulsorily dissolved. We have already noted[1] that when a partner is adjudicated insolvent he ceases to be a partner. Therefore, when all the partners or all except one are adjudicated insolvent there is no question of persons remaining partners with one another and, therefore, there has to be dissolution of the firm.

(2) If the business of the firm though lawful when the firm came into existence subsequently becomes unlawful there has to be dissolution of the firm. This provision is based on the rules of the law of contract. For a valid contract the object and consideration have to be lawful as defined in section 23, Indian Contract Act. Sec. 56 of the Contract Act further provides that when the contract to do an act becomes unlawful after making the contract, such a

1. Sec. 34.

contract becomes void. For example, a number of person join together as partners to sell liquor in a certain area. Subsequently the Government imposes prohibition in that area and the sale of liquor is banned. As soon as the sale of liquor in that area becomes unlawful the firm is dissolved.

If the firm was carrying on more than one adventures or undertakings the illegality of one or more of them shall not of itself result in the dissolution of the firm in respect of those adventures or undertakings which are still lawful.

There is also compulsory dissolution of the firm if some event happens because of which it becomes unlawful for the partners to continue as partners with each other. For example, two partners reside and carry on trade in two different countries. [2]If war breaks out between these two countries and further commercial intercourse between the two partners thereby becomes against public policy and thus unlawful, there is compulsory dissolution of the firm.

42. Dissolution on the happening of certain contingencies.—Subject to contract between the partners a firm is dissolved—

(a) if constituted for a fixed term, by the the expiry of that term ;

(b) if constituted to carry out one or more adventures or undertakings by the completion thereof ;

(c) by the death of a partner ; and

(d) by the adjudication of a partner as an insolvent.

Comments

Section 41 mentions certain events on the happening of which there is compulsory dissolution. On the happening of the events mentioned in this section the firm is dissolved unless there is a contract to the contrary. It means that on the happening of the events mentioned in this section the partners may still agree that the firm be not dissolved and the business of the firm be continued as before.

Clause (a)—Expiration of the partnership term.—When the partnership had been constituted for a fixed term it continues obviously for that contemplated term and would be dissolved on the expiry of such term. If the partners so like they may agree to the contrary and continue the business even beyond that time. Such an agreement may be express or implied. If a fresh term is not stipulated then it will be considered to be a partnership at will. Unless otherwise agreed the same mutual rights and duties continue for the extended period as they were there before the expiry of the term.[2]

2. Sec. 17 (b).

Clause (b)—Completion of the adventure.—Partnership created for some specific adventures or undertakings comes to an end on the completion of such adventures or undertakings. There can, however, be an agreement by which the partnership may not be dissolved and the business may be continued for some other adventures or undertakings after the completion of the earlier ones. Unless otherwise agreed the same mutual rights and duties between the partners continue in respect of their relationship for the new adventures and undertakings also.[3]

Clause (c)—Death of a partner.—Death of a partner results in the dissolution of the firm unless the remaining partners agree to the contrary. This provision is applicable when there are more than two partners in a firm, where on the death of one of them the others may agree to still continue the same old firm without its being dissolved. If there are only two partners and they agree that on the death of one of them the firm would not be dissolved but will continue with the surviving partner and the heir of the deceased partner, the agreement is meaningless because on the death of one of them there remains only one partner. There is no partnership to which somebody else could be introduced. If the heir of the deceased partner is to carry on the business in partnership with the surviving partner, it will be a new partnership for which an agreement between the two persons to create partnership has to be entered into. In *Mt. Sughra* v. *Babu*[4], it was held that when a firm consisted of just two partners, a term in their contract not to dissolve the firm on the death of one of them was invalid.) Agarwala J. observed :[5]

"In the case of a partnership consisting of only two partners, no partnership remains on the death of one of them and, therefore, it is contradiction in terms to say that there can be a contract between two partners to the effect that on the death of one of them the partnership will not be dissolved but will continue.

Partnership is not a matter of status, it is a matter of contract. No heir can be said to become a partner with another person without his own consent, express or implied."

Similar view was expressed by the Madras High Court in *Narayanan* v. *Umaval.*[6] In *Commissioner. of Income tax* v. *Seth Govindram*[7], the Supreme Court accepted the view of the Allahabad and the Madras High Courts as discussed above and rejected the view expressed by the Calcutta and the Nagpur High Courts to the contrary.

3. Sec. 17 (c).
4. A. I. R. 1952 All. 506.
5. Ibid., at p. 507.
6. A. I. R. 1959 Mad. 283. See Han raj Manot v. Gorak Nath Pandey, 66 C. W. N. 262 : 1962 Cal. L. J. 230 and Chainkaran Sidhakaran v. Radhakisan, A. I. R. 1966 Nag 46 for a contrary view.
7. A. I. R. 1966 S. C. 24.

Clause (d)—Insolvency of a partner.—When a partner is adjudicated insolvent he ceases to be a partner. The firm is also dissolved unless there is an agreement between the partners, other than the insolvent, to the contrary. This provision has to be read alongwith sec. 41 (a) which states that when all or all except one partner become insolvent there is compulsory dissolution of the firm. If, therefore, there are only two partners and one of them is adjudicated insolvent there is compulsory dissolution under section 41 and there is no question of there being a contract to the contrary making the firm to continue.

43. Dissolution by notice of partnership at will.—(1) Where the partnership is at will, the firm may be dissolved by any partner giving notice in writing to all the other partners of his intention to dissolve the firm.

(2) The firm is dissolved as from the date mentioned in the notice as the date of dissolution or, if no date is so mentioned, as from the date of the communication of the notice.

Comments

Sub-sec. (1)—Dissolution of partnership at will by notice

When the partnership is at will as defined in section 7, the partners are not bound to remain as partners or continue the partnership for any fixed period. Any partner of such a partnership can seek dissolution of the firm. This can be done by a partner by serving a notice on the other partners asking for the dissolution of the firm. The notice to be valid must be in writing, it should be given to all the other partners and it must clearly and in unambiguous terms indicate the intention of the partner giving the notice to dissolve the firm.[8] Dissolution by a notice under this section will be valid even though one of the partners to whom the notice is given is insane.[9] When the partnership was originally constituted for a fixed term, but the partners continue the business even after the expiry of that term, unless otherwise agreed, the partnership is now deemed to be a partnership at will[10] and, therefore, it can now be dissolved by a notice as stated in this section. A notice for dissolution once given cannot be withdrawn unless the other partners agree to the same.[11]

Although a partnership at will can be dissolved by a notice there is, however, nothing which prevents the dissolution of such partnership under the other provisions of the Act. Thus, a partnership at will could also be dissolved by mutual consent, insolvency or death of a partner.

8. See Chainkaran Sidhakaran Oswal v. Radhakrisan, A. I. R. 1956 Nag. 48 : I. L. R. (1955) Nag. 498 : 1956 Nag. L. J. 686.
9. Melleresh v. Keen, (1859) 27 Beav. 236.
10. See sec. 17 (b).
11. Jones v. Lloyd, 18 Eq. 265.

Sub-sec. (2)—Date of dissolution

The partner giving a notice for the dissolution of a partnership at will may mention the date from which he wants the dissolution to be effective. If that is so the firm will be dissolved from the date mentioned in the notice. If no such date has been mentioned the dissolution will take effect from the date of the communication of the notice. A partner could give such a notice without going to the court. But if a partner so likes he may effect the dissolution by going to the court. In such a case "a partnership will be deemed to be dissolved when the summons accompanied by a copy of the plaint is served on the defendant, where there is only one defendant, and on all defendants, when there are several defendants. Since a partnership will be deemed to be dissolved only from one date, the date of dissolution would have to be regarded to be the one on which the last summons were served."[12]

If a partner dies before the dissolution could become effective by a notice of a partnership at will, the dissolution would take place from the date of the death of the partner and the rights of the partners will be the same as they would have been on the dissolution by the death of a partner.[13]

44. Dissolution by the Court.—At the suit of a partner, the Court may dissolve a firm on any of the following grounds, namely—

(a) that a partner has become of unsound mind, in which case the suit may be brought as well by the next friend of the partner who has become of unsound mind as by any other partner ;

(b) that a partner, other than the partner suing, has become in any way permanently incapable of performing his duties as partner ;

(c) that a partner, other than the partner suing, is guilty of conduct which is likely to affect prejudicially the carrying on of the business, regard being had to the nature of the business ;

(d) that a partner, other than the partner suing, wilfully or persistently commits breach of agreements relating to the management of the affairs of the firm or the conduct of its business, or otherwise so conducts himself in matters relating to the business that it is not reasonably practicable for the other partners to carry on the business in partnership with him ;

(e) that a partner, other than the partner suing, has in any

12. Banarsi Das v. Kanshi Ram, A. I. R. 1963 S. C. 1165, at pp. 1169-70.

13. McLeod v. Dowling, 43 T. L. R. 655.

way transferred the whole of his interest in the firm to a third party, or has allowed his share to be charged under the provisions of Rule 49 of Order XXI of the First Schedule to the Code of Civil Procedure, 1908, or has allowed it to be sold in the recovery of arrears of land revenue or of any dues recoverable as arrears of land revenue due by the partner ;

(f) that the business of the firm cannot be carried on save at a loss ; or

(g) on any other ground which renders it just and equitable that the firm should be dissolved.

Comments

This section deals with the dissolution of a firm by the court. The question of dissolution by the court arises when all the partners do not want the dissolution. The partner or partners who want dissolution can file a suit and the other partners may contest the same. A suit for dissolution can be filed only when one or the other ground mentioned in section 44 is there. Even when there is a valid ground for filing the suit for dissolution and a partner accordingly files the suit, the court is not bound to decree dissolution as this section clearly provides that "At the suit of a partner, the Court *may* dissolve the firm."

The grounds which justify the filing of suit by a partner for the dissolution of the firm are as under :

(1) Unsoundness of mind.—When a partner becomes of unsound mind neither he can protect his own interest nor can he perform his duties as a partner. Therefore, when a partner becomes of unsound mind a suit for the dissolution of the firm can be filed. Such a suit may be filed either on behalf of the partner who has become of unsound mind, or by any other partner.

(2) Permanent incapacity to perform duties.—When a partner becomes permanently incapable of performing his duties as a partner that is a good ground for applying to the court for the dissolution of the firm. When the incapacity is not permanent the court would not grant relief. In *Whitwell* v. *Arthur*[14] one partner filed a suit for the dissolution of the firm when the other suffered from the paralytic attack and was thereby incapacitated from his duties as a partner. It was found from medical evidence that the capacity was not likely to be permanent as the defendant's health was improving. The court did not grant the dissolution of the firm.

When a partner becomes permanently incapable of performing his duties, the suit for dissolution can only be filed by any other partner, and not by the partner who suffers from the incapacity.

14. 35 Beav. 140.

(3) Conduct injurious to the partnership business.—When a partner is guilty of conduct which is likely to effect prejudicially the carrying on the business of the firm, the court may dissolve the firm on that ground. Misconduct need not be with regard to the partnership business, but the conduct should be such as would prejudicially affect the partnership business. The acts of adultery by a partner in a firm of bankers has been considered to be no ground for seeking dissolution by the other partners but that may be so if it is a firm of medical practitioners.[15] Conviction for a breach of trust,[16] or the adultery by one partner with another partner's wife[17] are good grounds for the dissolution of the firm.

The suit for dissolution can not be brought by the guilty partner, but by a partner other than one who is guilty of conduct discussed above.

(4) Persistent breach of partnership agreements.—When a partner wilfully and persistently commits breach of agreements relating to the management of the affairs of the firm, or so conducts himself in matters relating to the firm's business that it is not reasonably practicable for the other partners to carry on the business in partnership with him, a suit for the dissolution of the firm may be filed. In *Harrison v. Tennant*[18], one of the partners in a firm of solicitors ignored the other two partners and declined to settle their disputes by mutual consultation. It was held that the conduct of one of the partners being destructive of mutual confidence, which could not be restored, was a valid ground for the dissolution of the firm. Similarly, when due to frequent quarrels there is no hope of mutual co-operation[19], or a partner prepares false accounts and enters in the accounts smaller sums of money than actually received from the customers[20], or when a partner refuses to render accounts and takes away the books of accounts of the firm[21], or a partner misuses partnership funds for paying personal debts[22], the court may order dissolution.

The suit for dissolution in this case also cannot be filed by the guilty partner. Only a partner other than him may file a suit.

(5) Transfer of the whole of a partner's interest.—When a partner has transferred the whole of his interest in the firm to a third party, it can be a ground on which the court may dissolve

15. Story v. Mitford, (1863) 13 L. T. 142.
16. Essel v. Hayward, 30 Beav. 158; Also see Carmichael v. Evans, (1904) 1 Ch. 486.
17. Abbot v. Crump, (1870) 5 Beng. L. R. 109.
18. (1855) 21 Beav. 482.
19. Baxter v. Wark, 4 Dr. and Sm. 273 : 172 R. R. 64 ; Watney v. Wells, 30 Beav. 332 R. R. 182.
20. Chatterton v. Price, (1856) 25 Beav. 142.
21. Vali Venkataswami v. Venkataswami, A. I. R. 1954 Mad. 9.
22. Smith v. Jeyes, (1941) 4 Beav. 503.

the firm.) Similar would be the position when a partner has allowed his share to be charged under the provisions of the Civil Procedure Code, or has allowed it to be sold in the recovery of the arrears of land revenue or any dues as arrears of land revenue. It is necessary that the transfer must be of the whole of the partner's interest rather than merely a part of it. For dissolution in this case also the suit can be filed only by a partner other than the one whose interest has been transferred.

(6) **When the business can be carried on only at a loss.**—The object of every partnership is to make profits. If it appers that the business of the firm cannot be carried on except at a loss, any of the partners may apply to the court for the dissolution of the firm.[23]

(7) **When dissolution is just and equitable.**—The court has been given very wide power of dissolution. Apart from ordering the dissolution of the firm on the grounds stated above the court has been vested with the power of dissolving the firm on any other ground which renders it just and equitable that the firm should be dissolved. In *Abbot v. Crump*,[24] adultery by one partner with another partner's wife was held to be a good ground for the dissolution of the firm by the court.

45. Liability for acts of partners done after dissolution.—(1) Notwithstanding the dissolution of a firm, the partners continue to be liable as such to third parties for any act done by any of them which would have been an act of firm if done before the dissolution, until public notice is given of the dissolution :

Provided that the estate of a partner who dies, or who is adjudicated an insolvent, or of a partner who, not having been known to the person dealing with the firm to be a partner, retires from, is not liable under this section for acts done after the date on which he ceases to be a partner.

(a) Notices under sub-section (1) may be given by any partner.

Comments

Liability after dissolution

It has been noted above that when a partner ceases to be a partner by retirement or expulsion his liability, for the acts of the firm done after such retirement or expulsion, towards the third parties can still arise until a public notice of the fact is given.[25] This section incorporates a similar provision. Inspite of dissolution the liability of the partners for an act of the firm can arise as before until a public notice of the dissolution of the firm

23. Jennings v. Baddeley, (1856) 3 K. & J. 78 : 112 R. R. 42.
24. (1870) 5 Beng. L. R. 109.
25. Secs. 32 (3) and 33 (2).

is given. The reason for such a liability is that the third party, who knew of their partnership and of mutual agency, can continue to presume that the mutual agency between such persons continues until public notice of the end of that mutual agency is given.

In the following cases the liability of the partners does not arise after the date of dissolution even though no public notice of dissolution of the firm has been given.

(1) When a partner dies, his estate is not liable for the acts done after his death. No public notice is needed on the death of a partner because the fact of death of a partner is deemed to have come to the knowledge of the persons who knew him.

(2) The position of a partner who is adjudicated insolvent is similar to that of a deceased partner. In his case also no public notice is needed and his estate is not liable for the acts done after the dissolution of the firm.

(3) No public notice is needed in case of a retired partner who was not known to be a partner to the third party dealing with the firm. This provision is similar to the one contained in proviso to section 32 (3).

In *Juggilal Kamalapat* v. *Sew Chand Bagree*[26], a firm consisting of three partners A, B and C was established in 1933 in the firm name "Messers Sew Chand Bagree", and it was got registered in the same firm name and with the same partners, i. e., A, B and C. In 1945 the firm was dissolved and thereafter only A carried on the business. In 1948, while the business was carried on by A alone, he made a contract in the name of the firm, i. e., Messers Sew Chand Bagree with the appellants, Messers Juggilal Kamalapat. The appellants, who obtained a decree against the firm, wanted to make A, B and C liable. It was contended that public notice of dissolution had not been given and, therefore, B and C were also liable alongwith A. It was established that when the appellants entered into the contract, B and C were not known to be partners to them. They came to know of the fact that B and C were also at one time partners only after the dispute in respect of the contract had arisen. It was held that B and C could not be made liable as they were not known to be partners to the appellants when the contract in question was made and, therefore, they were protected under the proviso to section 45.

46. Right of partners to have business wound up after dissolution. On the dissolution of a firm every partner or his representatives is entitled, as against all the other partners or their representatives, to have the property of the firm applied in payment of

26. A. I. R. 1960 Cal. 463 ; Also see Tower Cabinet Co. v. Ingram, (1949)
2 K. B. 397.
7

the debts and liabilities of the firm, and to have the surplus distributed among the partners or their representatives according to their rights.

Comments

By dissolution the relation of partnership between various partners comes to an end. Thereafter there has to be winding up of the affairs of the firm. That includes realisation of the assets of the firm and also paying off all the liabilities, and then to distribute the surplus, if any, amongst the partners. On the dissolution of a firm every partner or his representative has a right to see that the affairs of the firm are properly wound up. He has a right to have the property of the firm applied in payment of the debts and liabilities of the firm. If, on the dissolution of the firm, the debts and liabilities of the firm remain unsatisfied, each partner continues to be exposed to the risk of being made jointly and severally liable for the same towards third parties. To avoid any such situation every partner or his representative has been made entitled, as against all the other partners or their representatives, to have the property of the firm applied in payment of the debts and liabilities of the firm, and then there is distribution of the surplus amonst the partners or their representatives according to their rights. The right contained in this section is also known as the partner's general lien over the surplus assets of the firm.[27] The lien is not on any specific property but it is only in the form of a claim against the surplus assets on realisation.

47. Continuing authority of partners for purposes of winding up.– After the dissolution of a firm the authority of each partner to bind the firm, and other mutul rights and obligations of the partners, continue notwithstanding the dissolution, so far as may be necessary to wind up the affairs of the firm and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise :

Provided that the firm is in no case bound by the acts of a partner who has been adjudicated insolvent ; but this proviso does not affect the liability of any person who has after the adjudication represented himself or knowingly permitted himself to be represented as partner of the insolvent.

Comments

Authority of partners during winding up

By dissolution of the firm the partners cease to be partners with one another and, therefore, the mutual agency which existed between them to act on behalf of each other to carry on the business of the firm also comes to an end. But after dissolution the

27. Re Bourne, (1906) 2 Ch. 427, 432, per Romer, l. J.

winding up of the affairs of the firm has got to be done. For example, the contracts already entered into have to be performed, amount due to the creditors has got to be paid, amount due from the firm's debtors has got to be realised, joint property has got to be disposed off and converted into cash. Moreover, capital contributed by the partners has to be refunded. Sometimes for realising the debts suit may have to be filed. For doing any act which is necessary to wind up the affairs of the firm the mutual agency between the partners still exists. A partner cannot place fresh order for the goods, but he can take delivery of the goods ordered before dissolution and pay for them. This section, therefore, declares that notwithstanding the dissolution of the firm, the mutual rights and obligations of the partners and the authority of each partner to bind the firm continues so far as that may be necessary to wind up the affairs of the firm and also to complete those transactions which had been begun but remained unfinished at the time of the dissolution.

When a partner dies and the partnership comes to an end, it is not only the right, but the duty, of a surviving partner to realise the assests for the purpose of winding up the partnership affairs including the payment of partnership debts.[28]

The authority under winding up does not empower a partner to create a 'novatio' in respect of a debt owing to the firm. That is not recovering a debt, but really continuing through somebody else as the debtor. His partners may previously consent to it or subsequently ratify or acquiesce in it ; otherwise it is not binding upon them.[29]

The following observations in *Motiram Chimanram* v. *Sarup Chand Pirthi Raj*[30] explain the authority of a partner during winding up :

"It is therefore clear that though the dissolution of a firm causes a dissolution of the partnership between the partners, the partnership still subsists, but merely for the purpose of winding up its business and adjusting the rights of the partners *inter se*, and for this purpose the authority of the partners to bind the firm, and all their mutual rights and obligations, continue notwithstanding the dissolution. The power of each partner however extends only so far as it is necessary to wind up the affairs of the firm and to complete transactions already begun. It has been held that if a debt is owing to the firm, payment by the debtor to any one of the partners extinguishes the claim of all the partners and discharges the debtor, even though a particular partner or a third person is

28. Bourne v. Bourne, (1906) 2 Ch. 427, at p. 431. This statement was quoted with approval by their Lordships of the Privy Council in Babu v. Official Assignee of Madras, 38 Cal W. N. 1018 : A. I. R. 1934 P. C. 138. Also see Gajanand v. Sardar Mal. A. I. R. 1961 Raj. 223.
29. Motilal v. Sarup Chand (1936) 38 Bom. L. R. 1058, at p. 1064.
30. A. I. R. (1937) Bom. 81 at p. 83 : (1936) 38 Bom. L. R. 7058, 1061.

appointed to collect the debts owing to the firm, and whether the debtor is aware of such appointment or not. Any partner of a dissolved firm can therefore recover payment of a debt due to the firm. He can effectually release the debtor and also give a valid receipt for the debt. But neither the release nor the receipt will be binding on his co-partners if the receipt is given, or the releasing partner acts, in fraud of his co-partners and in collusion with the debtor."

In *Butchart* v. *Dresser*,[31] A and B, the two partners agreed to buy certain shares. The payment for those shares had not been made and the firm was dissolved. A pledged those shares to borrow money from the firm's bankers to pay for those shares. B contended that the pledging of shares was not valid as the firm had been dissolved and the bankers knew about the dissolution.

It was held that the pledging of the shares was necessary to raise fund for completing the contract previously made by the firm. It was not beyond the authority of the partner doing so and as such the other partner was bound by the transaction.

Proviso to sec. 47 states that the rule of the existence of mutual agency between the partners for the purpose of winding up does not apply in the case of an insolvent partner, and the firm is in no case bound by the acts of a partner who has been adjudicated insolvent. However, any person who has after the adjudication represented himself or knowingly permitted himself to be represented as a partner with the insolvent, can be made liable as a partner.

48. Mode of settlement of accounts between partners.—In settling the accounts of a firm after dissolution, the following rules shall, subject to agreement by the partners, be observed :—

(a) Losses, including deficiencies of capital, shall be paid first out of profit, next out of capital, and, lastly, if necessary, by the partners individually in the proportions in which they were entitled to share profits.

(b) The assets of the firm, including any sums contributed by the partners to make up deficiencies of capital, shall be applied in the following manner and order :—

(i) in paying the debts of the firm to third parties ;

(ii) in paying to each partner rateably what is due to him from the firm for advances as distinguished from capital ;

31. 10 Hare 453 : 102 R. R. 269 ; Also see Re Bourne, (1906) 1 Ch. 113 ; (1906) 2 Ch. 427.

(iii) in paying to each partner rateably what is due to him on account of capital ; and

(iv) the residue, if any, shall be divided among the partners in the proportions in which they were entitled to share profits.

Comments

This section mentions the mode of the settlement of accounts between the partners on the dissolution of the firm. The rules as stated in this section are applicable when the partners have not made an agreement on these points. The rules which emerge from this section are as under :

1. Losses are to be shared equally. The deficiency in capital is also to be treated like an ordinary loss and the partners are to bear that loss in the same proportion in which they were sharing profits and losses. For example, A, B and C contributed a capital of Rs. 25,000/-, Rs. 20,000/- and R. 5,000/- respectively, but they share the profits and losses equally. The total capital is Rs. 50,000/-. If the assets realise Rs. 20,000/- only, there is deficiency of capital to the extent of Rs. 30,000/-. Each partner is bound to contribute Rs. 10,000/- for the loss. After the partners make good this deficiency, total amount of Rs. 50,000/- will be available and that will be utilised for the return of capital contributed by the partners.

In *Nowell* v. *Nowell*,[32] A and B had contributed unequal amount—£ 1929 and £ 29 respectively—towards the capital. They had agreed to share the profits and the losses equally. A deficiency of £ 500 in capital having arisen, it was held that the same was to be shared equally between A and B.

If one or more partners become insolvent and they are not able to contribute their share of the loss, the solvent partners are not bound to contribute for the share of the insolvent partners.[33]

2. On the dissolution of the firm if the amount available is sufficient to meet all the claims of the partners and the third parties there is no problem. If, on the other hand, the amount available is insufficient the payments are to be made in a certain order. Sub-sec. (2) says that the amount available is to be utilised for making payments in the following order :

(1) Making payments for the debts of the firm to the third parties ;

(2) If some partners have given advance over and above

32. (1869) L. R. 7 Equity cases 538.
33. Garner v. Murray, (1904) 1 Ch. 57 : (1904) 73 L. J. Ch. 66. Also see Hira Nand v. Dula Ram, A. I. R. 1933 Lahore 1022.

the capital, then the amount is to be utilised in making payment to each one of them rateably ;

(3) Making payment to each partner rateably what is due to him on account of capital ;

(4) The residue, if any, is deemed to be profit and the same is to be divided among the partners in the proportions in which they were entitled to share profits.

49. Payment of firm debts and of separate debts.— Where there are joint debts due from the firm, and also separate debts due from any partner, the property of the firm shall be applied in the first instance in payment of the debts of the firm, and, if there is any surplus, then the share of each partner shall be applied in payment of his separate debts or paid to him. The separate property of any partner shall be applied first in the payment of his separate debts, and the surplus (if any) in the payment of the debts of the firm.

Comments

Sometimes there may be joint debts due from the firm and separate debts due from a partner and the property of the firm may not be enough to satisfy them all. The question arises as to which debts are to be satisfied out of the firm's property. A similar question also arises when there is a claim against the separate property of a partner of the joint debts and the separate debts. This section incorporates the following rules :

1. The property of the firm shall be applied in the first instance in payment of the debts of the firm, and if there is any surplus, then the share of each partner shall be applied in payment of his separate debts or paid to him. It is a corollary to section 46 of the Act, which provides that a partner has a right to get the joint property of the firm applied in payment of the debts and liabilities of the firm and then the distribution of the surplus amongst the partners or their representatives.

2. The separate property of any partner shall be applied first in the payment of his separate debts, and the surplus, if any, may be utilised in the payments of the debts of the firm.

50. Personal profits earned after dissolution.—Subject to contract between the partners, the provisions of clause (a) of section 16 shall apply to transactions by any surviving partner or by the representatives of a deceased partner, undertaken after the firm is dissolved on account of the death of a partner and before its affairs have been completely wound up :

Provided that where any partner or his representative has bought the goodwill of the firm, nothing in this section shall affect his right to use the firm name.

Comments

We have already noted section 16 (a), according to which no partner can make a personal gain out of any transaction of the firm or the use of the name, property or business connection of the firm. If he makes any such gain he shall account for that to the firm.[34] A similar duty is contained in section 50 on the dissolution of a firm by the death of a partner. Therefore, a partner making personal profits after dissolution and before winding up has to account for those profits. The reason is that until there is winding up all the partners continue to be the owners of the firm and also the joint property and, therefore, no partner can gain any personal advantage by the use thereof for his personal gain.

Section 53 of the Act empowers the partners or their representatives to restrain any other partner or his representative from carrying on the similar business in the firm name or from using any of the property of the firm for his own benefit, until the affairs of the firm have been completely wound up.

If, after the dissolution of the firm, any partner or his representative buys the goodwill of the firm he can make use of the firm name and he shall not be subject to the liability discussed above.

51. Return of premium on premature dissolution.—Where a partner has paid a premium on entering into partnership for a fixed term, and the firm is dissolved before the expiration of that term otherwise than by the death of partner, he shall be entitled to repayment of the premium or of such part thereof as may be reasonable, regard being had to the terms upon which he became a partner and to the length of time during which he was a partner, unless—

(a) the dissolution is mainly due to his own misconduct, or

(b) the dissolution is in pursuance of an agreement containing no provision for the return of the premium or any part of it.

Comments

When a person is admitted as a partner to an already established business he has generally to pay some consideration, known as premium to secure the right of becoming and remaining a partner in the firm. The premium goes to the pockets of those persons who were already carrying on the business.

If a person pays premium to become a partner for a certain specified period, but the partnership ends before the expiry of that term, he is entitled to refund of premium. How much premium is to be refunded will depend on the terms on which he became a

34. Aas v. Benham, (1891) 2 Ch. 254 ; Bentley v. Craven, (1853) 18 Bea v. 75 : 104 R. R. 373.

partner and the length of time during which he was a partner. Regard being had to these things, whatever is reasonable will be returned.

It may be noted that the return of premium or part thereof is allowed when a person became a partner for a fixed term, and there is dissolution of partnership before the expiry of that term. Therefore, there is no question of return of premium if the partnership was at will. If an agreement between the partners in a partnership at will provides for the refund of premium, or the partner receiving the premium is acting fraudulently, premium may be refunded even in a partnership at will. In a partnership at will, a partner cannot dissolve the partnership soon after receiving the premium and then retain the premium.[35]

In the following exceptional cases even though the partnership was for a fixed term there will be no refund of premium on its premature dissolution :

1. When the dissolution of partnership occurs by the death of a partner, there is to be no refund of premium unless there is an express stipulation in a contract between the partners.[36] But if a person knowing himself to be in a dangerous state of health and suffering from a fatal disease conceals this fact and receives the premium, it is a case of fraud and the premium will have to be refunded if there is premature dissolution due to the death of such partner.[37]

2. When the dissolution of the firm is mainly due to the misconduct of the partner who paid the premium, he is not entitled to any refund. The reason is that a guilty person should not take advantage of his own wrong. But if the person receiving the premium is guilty,[38] or both the partners, *i. e.*, the one receiving and the one paying the premium are guilty,[39] or where none of them is guilty,[40] the court will order the refund of premium.

3. When the dissolution is by an agreement but the agreement does contain any provision for the return of premium or any part thereof, nothing is to be returned. In such a case the inference is that if the partners while agreeing to the dissolution are silent about the return of the premium, they do not intend any return.

52. Rights where partnership contract is rescinded for fraud or misrepresentation.—Where a contract creating partnership is rescinded on the ground of the fraud or misrepresentation of any

35. Featherstonhaugh v. Turner, 25 Beav. 382 ; Tattersall v. Groote, 2 Bos. & P. 134.
36. Whineup v. Hughes, (1871) L. R. 6 C. P. 78 ; Ferns v. Carr, (1885) 28 Ch. D 409.
37. Mackenna v. Parkes, (1866) 36 L. J. Ch. 366.
38. Bullock v. Crockett, 3 Giff. 507; Rooke v. Nisbet, 50 L. J. Ch. 588.
39. Astle v Wright, 23 Beav. 77; Pease v. Hewitt, 31 Beav. 22.
40. Atwood v. Mande, 3 Ch. 369.

of the parties thereto, the party entitled to rescind is, without prejudice to any other right, entitled—

(a) to a lien on, or a right of retention of, the surplus of the assets of the firm remaining after the debts of the firm have been paid, for any sum paid by him for the purchase of a share in the firm and for any capital contributed by him ;

(b) to rank as a creditor of the firm in respect of any payment made by him towards the debts of the firm ; and

(c) to be indemnified by the partner or partners guilty of the fraud or misrepresentation against all the debts of the firm.

Comments

When a person becomes a partner he invests capital, he may sometimes give advance over and above the capital, he may have paid premium for becoming a partner. During partnership he may make payments on behalf of the firm. Apart from that for all acts of the firm done while he is a partner he incurs joint and several liability towards third parties. When a partner rescinds the contract of partnership and leaves the firm on the ground of fraud or misrepresentation of the other partners all his interests have got to be protected. This section grants necessary protection to the partner thus rescinding the contract. Apart from the right of avoiding the contract on ground of fraud or misrepresentation which is available to him according to section 19 of the Indian Contract Act, and also a right to claim damages for fraud under the law of torts, he is entitled to the following rights :

1. He has a right of lien on, or a right of retention of, the surplus assets so far as it may be necessary to return the capital contributed by him and also ıor any other sum which he may have paid for the purchase of share in the firm, *i. e.*, payment of premium made by him.

2. He is to rank as a creditor of the firm in respect of any payment made by him towards the debts of the firm. Being treated as a creditor means priority in the payment of that amount, as is stated in sections 48 (3) (i).

3. He has also a right to claim indemnity from the partners guilty of fraud or mirespresentation against all the debts of the firm.

53. Right to restrain from use of firm name or firm property.—After a firm is dissolved every partner or his representative may, in the absence of a contract between the partners to the contrary, restrain any other partner or his representative from

carrying on a similar business in the firm name or from using any of the property of the firm for his own benefit, until the affairs of the firm have been completely wound up :

Provided that where any partner or his representative has bought the goodwill of the firm, nothing in this section shall affect his right to use the firm name.

Comments

Not only during the continuance of the firm but even after dissolution a partner cannot use the firm's property or firm's name for personal benefit, until the affairs of the firm have been completely wound up. This section empowers a partner is his representative to restrain any other partner or his representative from carrying on a similar business in the firm name or from using any of the property of the firm for his own benefit, until the affairs of the firm have been completely wound up. This rule is subject to a contract between the partners to the contrary. However, where a partner or his representative has bought the goodwill of the firm he can use the firm name.

54. Agreements in restraint of trade.—Partners may, upon or in anticipation of the dissolution of the firm, make an agreement that some or all of them will not carry on a business to that of the firm within a specified period or within specified local limits ; and notwithstanding anything contained in section 27 of the Indian Contract Act, 1872, such agreement shall be valid if the restrictions imposed are reasonable.

Comments

On the dissolution of the firm one of the partners sometimes may purchase the business, or sometimes the business may be sold to a third party. The partners may, upon or in anticipation of the dissolution of the firm, make an agreement that some or all of them will not carry on a business similar to that of the firm within specified period or within specified local limits. Notwithstanding the rule contained in sec. 27 of the Contract Act that an agreement in restraint of trade is void, such an agreement is valid if the restrictions which are imposed are reasonable.

55. **Sale of goodwill after dissolution.**—(1) In settling the accounts of a firm after dissolution, the goodwill shall, subject to contract between the partners, be included in the assets, and it may be sold either separately or alongwith other property of the firm.

(2) **Rights of buyer and seller of goodwill.**—Where the goodwill of a firm is sold after dissolution, a partner may carry on a business competing with that of the buyer and he may advertise such business, but, subject to agreement between him and the buyer, he may not—

(a) use the firm name,

(b) represent himself as carrying on the business of the fiirm, or

(c) solicit the custom of persons who were dealing with the firm before its dissolution.

(3) **Agreements in restraint of trade.**—Any partner may, upon the sale of the goodwill of a firm, make an agreement with the buyer that such partner will not carry on any business similar to that of the firm within a specified period or within specified local limits, and, notwithstanding anything contained in section 27 of Indian Contract Act, 1872, such agreement shall be valid if the restrictions imposed are reasonable.

Comments

Goodwill is an asset of the firm, and, therefore, on the dissolution of the firm, it may be sold either separately or alongwith other assets of the firm.

When the goodwill of the firm has been sold after dissolution, unless the buyer of the goodwill imposes some restrictions, the seller of the goodwill, that is, the partners of the firm may carry on a business competing with that of the buyer and may also advertise such business. However, the carrying on the other business is subject to the following restrictions :

1. He cannot use the name of the firm. On the sale of goodwill, it is only the buyer of the goodwill who can use the name of the firm.

2. He cannot represent himself to be carrying on the business of the firm. In *Hookham* v. *Pottage*[41], on the dissolution of the firm, "Hookham and Pottage", by a decree of the court it was decided that the goodwill should belong to Hookham. Hookham now continued the business, under the name "Hookham & Co". The other partner, Pottage also started a business in the same area and named his shop as, "Pottage from Hookham and Pottage." It was held that use of the firm name like that would create an impression that he was connected with the old firm and, therefore, Hookham was entitled to obtain injunction restraining Pottage from using the firm name like that.

3. He cannot solicit the custom of persons who had been dealing with the firm before dissolution. It means that he cannot canvass for the customers being diverted from the old business towards him. If they themselves come to him he may attend to them, but it will be wrong if he approaches them with an idea to persuade them for being diverted towards himself. In *Trego* v. *Hunt*,[42] Trego, who was varnish and japan manufacturer took

41. (1872) 8 Ch. 91.
42. (1896) A. C. 7.

Hunt into partnership on the condition that the goodwill of the business will be the sole property of Trego. Trego died and then Hunt made an agreement with Mrs. Trego, who succeeded Mr. Trego, that he would continue as partner for 7 years and the goodwill will remain the sole property of Mrs. Trego. When approximately one year of partnership was left, it was discovered by Mrs. Trego that Hunt had employed a clerk of the firm to prepare a list of the firm's customers, after the office hours. His object obviously was to approach them after retirement to convass them for becoming his customers. It was held that Mrs. Trego was entitled to obtain an injunction to restrain Hunt from making such copies of the lists of the firm's customers.

If the buyer of the goodwill wants further protection of his interest he may make an agreement with the seller of the goodwill, *i. e.*, the partners of the firm stipulating that any such partner shall not carry on any business similar to that of the firm within a specified period or within specified local limits. Notwithstanding the rule contained in sec. 27, Indian Contract Act, that an agreement in restraint of trade is void, such an agreement will be valid if the restrictions imposed are reasonable.

CHAPTER VII

REGISTRATION OF FIRMS

Introduction

This chapter deals with the registration of partnership firms. The Act does not make the registration of partnership firms compulsory in India nor does the Act impose any penalties for non-registration as are imposed in England under the Registration of Business Names Act, 1916. However, certain disabilities are provided in section 69 of the Act for unregistered firms and their partners. The procedure of registration is very simple and the disadvantages of non-registration are so great that generally the partners of a firm would like to get the firm registered.

Sections 58 and 59 deal with the procedure for the registration of a firm. The registration of a firm may be effected by submitting to the Registrar of Firms a statement in the prescribed form and accompanied by the prescribed fee. The Registrars of Firms are appointed by the State Government and State Government is also to define the areas within which the Registrars shall exercise their powers and perform their duties. (Sec. 57). The statement for registration must mention (i) the firm name, (ii) the place or principal place of business of the firm, (iii) the names of any other places where the firm carries on business, (iv) the date when each partner joined the firm, (v) the names and permanent addresses of the partners, and (vi) the duration of the firm. (Sec. 58). When the Registrar is satisfied that the abovementioned requirements have been complied with, he shall record an entry of the statement in the register called the Register of Firms, and shall file the statement. (Sec. 59).

The object of registration is to protect the interests of those who may be dealing with the firm so that the necessary particulars concerning a firm could be available to them. The Register of Firms shall be open to inspection by any person on payment of the prescribed fee. Moreover, all statements, notices and intimations filed by a registered firm or its partners shall also open to inspection, subject to such conditions and on payment of such fee as may be prescribed. (Sec. 66). Any person on payment of the prescribed fee shall also be entitled to have a copy, duly certified by the Registrar, of any entry or portion thereof in the Register of Firms. The partners should be careful while sending any statement, intimation or notice to the Registrar of Firms. They must send correct information and if subsequently there is any change the information of the same must also be sent at the earliest. It has been provided by sec. 68 (1) that the documents filed with the Registrar, on the basis of which he prepares his record

and the Register of Firms, shall be conclusive proof of the facts contained therein as against any person by whom or on whose behalf such document was signed. Supposing a partner of a registered firm retires but no notice of the change is given to the Registrar, the existence of the name of the partner in the record of the Registrar shall be a conclusive proof as against such a partner and he can be made liable to the third parties as if he were still a partner in the partnership firm. A third party, therefore, can take benefit of what is there in the records with the Registrar. A certified copy of an entry relating to a firm in the Register of Firms may be produced in proof of the fact of the registration of such firm, and of the contents of any statement, intimation of notice recorded or noted therein. [Sec. 68 (2)].

Changes after registration

Various changes may occur after the firm has been registered. So that the Registrar can also record the change in respect of a particular firm necessary information may be given to the Registrar. For example, there may be alteration in the firm name or in the location of the principal place of business of a registered firm, or there may be closing or opening of some branches, or there may be change in the names and addresses of the partners. In all scuh cases intimation about the alteration may be sent to the Registrar, who shall file it alongwith the statement relating to the firm filed under sec. 59. (Ss. 60, 61, 62). Similarly, a change may occur in the constitution of the firm, for instance, some new partner may join or an existing partner may retire or there may be the dissolution of a firm. Upon such a change also notice of the fact may be given to the Registrar. It has already been noted that according to sections 32 (2) and 45, when a partner retires or is expelled or the firm is dissolved a public notice of the same has to be given, otherwise the liability of all the persons who were partners but have now ceased to be so, still continues to be there for the acts of each other. In the case of a registered firm public notice includes notice to the Registrar of Firms also under sec. 63. Similarly, a minor who had been admitted to the benefits of partnership, on attaining majority, should elect as to whether he becomes a partner or not and give a public notice of the same. Public notice here also means a notice to the Registrar in case the firm is a registered one.

In case the entry in the Register of Firms relating to any particular firm is not in confirmity with the documents filed with the Registrar, the Registrar has a power at all times to rectify any mistake in the Register to bring it in confirmity with the documents filed. (Sec. 64). According to sec. 65 a Court can also order an amendment in the Register of Firms. A Court deciding any matter relating to a registered firm may direct that the Registrar shall make any amendment in the entry in the Register of Firms relating to such firm which is consequential upon its deci-

sion ; and the Registrar shall amend the entry accordingly.

Effects of non-registration

It has already been noted that the registration of a partnership firm is not compulsory in India, nor are any penalties imposed if a firms does not get itself registered. Section 69 of the Act provides certain disabilities for such firms and their partners who do not get themselves registered. In view of those disabilities generally the partners of a firm would prefer to get the firm registered. Section 69 bars certain suits and proceedings in respect of an unregistered firm. The main provisions of section 69 are as under :

(1) Institution of suits between the partners *inter se* or between the partners and the firm for the purpose of enforcing rights arising from a contract or conferred by this Act is barred unless the firm is registered and the person suing has been shown in the Register of Firms as a partner.

(2) Institution of suits by a firm or its partners against third parties to enforce a right arising from a contract is barred unless the firm is registered and the persons suing have been shown in the Register of Firms as partners. It may be noted that this disability is only against an unregistered firm or its partners and not against the third party. A third party can file a suit against a registered or an unregistered firm in the same way.

(3) An unregistered firm is also barred from claiming a set-off which may be in the nature of a counter-claim. There is also a bar against other proceedings by an unregistered firm. In *Jagdish Chand Gupta* v. *Kajaria Traders* the Supreme Court has held that other proceedings include arbitration proceedings also and, therefore, the partner of an unregistered firm cannot bring an action in a court of law to enforce an arbitration agreement. Similarly, an action by an unregistered firm against the landlord of the firm for the reduction of the rent arising out of the contract of tenancy is not maintainable.

(4) The abovestated disabilities do not apply in the following cases :

(i) A suit can be brought by an unregistered firm or its partners for the dissolution of the firm or for the accounts of the dissolved firm. After the firm is dissolved a suit can also lie for the realisation of the property of the dissolved firm.

(ii) Even if the firm is unregistered an official assignee, receiver or the court can file a suit to realise the property of an insolvont partner.

(iii) An unregistered firm or its partners can sue or claim set-off where the subject matter does not exceed Rs. 100.

(iv) If the Act or the provisions of this Chapter are not to be applicable in a certain area (see Sec. 56), the disabilities mentioned in sec. 69 obviously do not apply to unregistered firms in that area.

56. Power to exempt from application of this Chapter.— The State Government of any State may, by notification in the Official Gazette, direct that the provisions of this chapter shall not apply to that State or to any part thereof specified in the notification.

Comments

This section empowers the State Governments to exempt the State or any part thereof from the application of the provisions of this chapter by issuing a notification to that effect.

57. Appointment of Registrars.—(1) The State Government may appoint Registrars of Firms for the purposes of this Act, and may define the areas within which they shall exercise their powers and perform their duties.

(2) Every Registrar shall be deemed to be a public servant within the meaning of section 21 of the Indian Penal Code.

Comments

Sub-section (1) empowers the State Governments to appoint Registrars of Firms and also to define the areas of jurisdiction for the various Registrars thus appointed for the purpose of exercise of their powers and performance of their duties in connection with the Registration of Firms.

Sub-sec. (2) declares that every Registrar shall be deemed to be a public servant within the meaning of sec. 21, I. P. C.

58. Application for Registration.—(1) The registration of a firm may be effected at any time by sending by post or delivering to the Registrar of the area in which any place of business of the firm is situated or proposed to be situated, a statement in the prescribed from and accompanied by the prescribed fee, stating—

(a) the firm name,

(b) the place or principal place of business of the firm,

(c) the names of any other places where the firm carries on business,

(d) the date when each partner joined the firm,

(e) the names in full and permanent addresses of the partners, and

(f) the duration of the firm.

The statement shall be signed by all the partners, or by their agents specially authorised in this behalf.

(2) Each person signing the statement shall also verify it In the manner prescribed.

(3) A firm name shall not contain any of the following words, namely :—

"Crown," "Emperor," "Empress," "Empire," "Imperial," "King," "Queen," "Royal," or words expressing or implying the sanction, approval or patronage of Government except when the State Government signifies its consent to the use of such words as part of the firm name by order in writing.

Comments

Sub-sec. (1) prescribes the mode of registration. An application on the form, which may be prescribed by the State Government under Sec. 71 (2) (a) of the Act, has to be made and the same is to be accompanied by the prescribed fee. Under sec. 71 (1) the State Government has been authorised to make rules prescribing the fees, but that shall not exceed the maximum fees specified in Schedule I, which is Rs. 3/- for the purpose. Particulars mentioned in sub-sec. (1) have got to be included in the application. The statement shall be signed by all the partners, or by their agents specially authorised in this behalf.

According to sub-sec. (2) each person signing the statement shall also verify it in the manner prescribed.

The provision that "registration of a firm may be effected at any time" by following the abovestated procedure, clearly shows that the registration is optional in India and there are no penalties for non-registration as are there in England under the Registration of Business Names Act, 1916. Moreover, if the partners choose to get the firm registered, that may be done *at any time*, and not necessarily at the time of the formation of the firm. If a firm remains unregistered the firm and its partners would suffer from the disabilities mentioned in sec. 69. If the firm is registered but some partner or partners have not been registered, *e. g.*, they join after the registration of the firm, such partners who are not registered, will be subject to the disabilities mentioned in sec. 69 (1) and (2).[1]

Sub-sec. (3) imposes restrictions on the firm name, and the firm name must not contain any of the words stated in the sub-section.

59. Registration.—When the Registrar is satisfied that the provisions of section 58 have been duly complied with he shall record an entry of the statement in a register called the Register of Firms, and shall file the statement.

1. Chiman Lal v. Firm New India Traders, A. I. R. 1962 Patna 125.

Comments

This section imposes a duty on the Registrar to register the firm. When he is satisfied that the provisions of section 58 have been complied with he is to record an entry in the Register of Firms and file the statement submitted by the partners under the preceding section.

60. Recording of alterations in firm name and principal place of business.—(1) When an alteration is made in the firm name or in the location of the principal place of business of a registered firm, a statement may be sent to the Registrar accompanied by the prescribed fee, specifying the alteration, and signed and verified in the manner required under section 58.

(2) When the Registrar is satisfied that the provisions of sub-section (1) have been duly complied with, he shall amend the entry relating to the firm in the Register of Firms in accordance with the statement, and shall file it alongwith the statement, relating to the firm filed under section 59.

Comments

When there is an alteration in the firm name or in the location of principal place of business of a registered firm, the same kind of formalities as have been mentioned in sec. 58 are to be observed. When the Registrar is satisfied that the necessary formalities have been complied with, he shall amend the entry in the Register of Firms.

61. Nothing of closing and opening of branches.—When a registered firm discontinues business at any place or begins to carry on business at any place, such place not being its principal place of business, any partner or agent of the firm may send intimation thereof to the Registrar, who shall make a note of such intimation in the entry relating to the firm in the Register of Firms, and shall file the intimation alongwith the statement relating to the firm filed under section 59.

Comments

When there is closing or opening of branches of an already existing firm, any partner or agent of the firm may send intimation thereof to the Registrar, who shall then make necessary changes in the Register of Firms.

62. Nothing of changes in names and addresses of partners.—When any partner in a registered firm alters his name or permanent address, an intimation of the alteration may be sent by any partner or agent of the firm to the Registrar, who shall deal with it in the manner provided in section 61.

Comments

In case there is any change in the name or permanent address of any partner of a registered firm, an intimation of the alteration

may be sent by any partner or agent of the firm to the Registrar. The Registrar shall then make necessary changes in the Register of Firms.

63. Recording of changes in and dissolution of a firm.—(1) When a change occurs in the constitution of a registered firm, any incoming, continuing or outgoing partner when a registered firm is dissolved, any person who was a partner immediately before the dissolution, or the agent of any such partner or person specially authorised in this behalf, may give notice to the Registrar of such change or dissolution, specifying the date thereof ; and the Registrar shall make a record of the notice in the entry relating to the notice in the Register of Firms and shall file the notice alongwith the statement relating to the firm filed under sectton 59.

Recording of withdrawal of a minor.—(2) When a minor who has been admitted to the benefits of partnership in a firm attains majority and elects to become or not to become a partner, and the firm is then a registered firm, he, or his agent specially authorised in this behalf, may give notice to the Registrar that he has or has not become a partner, and the Registrar shall deal with the notice in the manner provided in sub-section (1).

Comments

Recording the changes in the constitution of a firm and the dissolution of a firm.— Changes in the constiution of the firm may occur either on the introduction of a partner[2] to the firm, or when a partner cases to be a partner by retirement[3], expulsion[4], insolvency[5] or death.[6] No fresh registration is needed on the death of a partner or otherwise in case of change in the constitution of the firm, but it is sufficient to notify the Registrar, who can make a note in the relevant register.[7] When change in the constitution of the firm occurs or the firm is dissolved notice thereof may be given to the Registrar by the incoming or outgoing partner, or by any of the continuing partners or by a duly authorised agent of any of the abovestated persons. Like registration of a firm the notice of the change in the constitution of the firm or its dissolution is not compulsory. However, in the case of retirement or expulsion of a partner or on the dissolution of a firm, public notice of such retirement[8], expulsion[9] or dissolution[10] has to be given, otherwise the liability of the partners for the act of each other continues to be the same as before. In the case of a registered

2. S. 31.
3. S. 32.
4. S. 33.
5. S. 34.
6. S. 35.
7. Durgadas Janak Raj v. Preete Shah Sant Ram, A. I. R. 1959 Punj. 530; Kesrimal v. Dalichand, A. I. R. 1959 Raj. 140.
8. S. 32 (3).
9. S. 33 (2).
10. S. 45.

firm public notice includes notice to the Registrar under sec. 63.[11]

When a minor has been admitted to the benefits of partnership such a minor on attaining the age of majority has to give a public notice of his election as to whether he becomes a partner or not.[12] Public notice in the case of a registered firm also includes notice to the Registrar.[13]

On receipt of the notice as stated above the Registrar shall make a record of the notice in the entry relating to the firm in the Register of Firm, and shall file the notice along with the statement relating to the firms filed under sec. 59.

64. Rectification of mistakes.—(1) The Registrar shall have power at all times to rectify any mistake in order or bring the entry in the Register of Firms relating to any firm into conformity with the documents relating to that firm filed under this Chapter.

(2) On application made by all the parties who have signed any document relating to a firm filed under this Chapter the Registrar may rectify any mistake in such document or in the record or note thereof made in the Register of Firms.

Comments

Under sub-sec. (1) the Registrar has been empowered to correct any mistakes which may have been there in the Register of Firms order to bring the Register relating to any firm in conformity with the documents filed under this Chapter.

Sometimes there may be some mistakes in the documents filed with Registrar or in the records of the Registrar. Sub-sec. (2) provides that on application made by all the parties who have signed documents relating to a firm, the Registrar may rectify any mistakes in such documents or in the record or note thereof made in the Register of Firms.

65. Amendment of Register by order of Court.—A Court deciding any matter relating to a registered firm may direct that the registrar shall make any amendment in the entry in the Register of Firms relating to such firm which is consequential upon its decision; and the Registrar shall amend the entry accordingly.

66. Inspection of Register and filed documents.—(1) The Register of Firms shall be open to inspection by any person on payment of such fee as may be prescribed.

(2) All statements, notices and intimations filed under this Chapter shall be open to inspection, subject to such conditions and on payment of such fee as may be prescribed.

11. S. 172 (a).
12. Sec. 30 (5).
13. Ss. 72 (a) and 63 (2).

67. Grant of copies.—The Registrar shall on application furnish to any person, on payment of such fee as may be prescribed, a copy, certified under his hand, of any entry or portion thereof in the Register of Firms.

68. Rules of evidence.—(1) Any statement, intimation or notice recorded or noted in the Register of Firms shall, as against any person by whom or on whose behalf such statement, intimation or notice was signed, be conclusive proof of any fact therein stated.

(2) A certified copy of an entry relating to a firm in the Register of Firms may be produced in proof of the fact of the registration of such firm, and of the contents of any statement, intimation or notice recorded or noted therein.

Comments

Sub-sec. (1) lays down the rule that the documents filed with the Registrar, on the basis of which he prepares his record and Register of Firms, shall be conclusive proof of the facts contained therein as against any person by whom or on whose behalf such document was signed. The facts in the documents are conclusive proof against the parties signing them and not against the third parties. Therefore, if a person's name is there in there Register of Firms as a partner, he would be liable as a partner and he will not be allowed to say that now he has ceased to be a partner. The object of the provision is to compel the partners to have the changes in the constitution of the firm notified to the Registrar. When a partner retires or is expelled or the firm is dissolved, the partners continue to be liable for the act of each other unless a public notice of such retirement[14] or expulsion[15] or dissolution[16] of the firm is given. Public notice in the case of a registered firm includes notice to the Registrar of Firms[17] for for his making the necessary changes. The third party, however, is allowed to prove against the facts noted with the Registrar. For example, a third party may prove that a person is or has been a partner in a firm although his name does not appear in the Register of Firms.[18]

Sub-sec. (2) provides that a certified copy of an entry relating to a firm in the Register of Firms may be produced to prove either the registration of the firm or some other statements etc. filed with the Registrar.

69. Effect of non-registration.—(1) No suit to enforce a right arising from a contract or conferred by this Act shall be instituted in any Court by or on behalf of any person suing as a

14. S. 32 (3).
15. S. 33 (2).
16. S. 45.
17. S. 72.
18. Snow White Food Products Pvt. Ltd. v. Sohanlal Bagla, A. I. R. 1964 Cal. 209.

partner in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm.

(2) No suit to enfore a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm.

(3) The provisions of sub-sections (1) and (2) shall apply also to a claim of set-off or other proceedings to enforce a right arising from a contract, but shall not affect—

(a) the enforcement of any right to sue for the dissolution of a firm or for accounts of a dissolved firm or any right or power to realise the property of a dissolved firm, or

(b) the powers of an official assignee, receiver or Co urt under the Presidency-towns Insolvency Act, 1919, or the Provincial Insovency Act, 1920, to realise the property of an insolvent partner.

(4) This section shall not apply—

(a) to firms or to partners in firms which have no place of business in the territories to which this Act extends, or whose places of business in the said territories are situated in areas to which, by notification under section 56, this Chapter does not apply, or

(b) to any suit or claim of set-off not exceeding one hundred rupees in value which, in the Presidency towns, is not of a kind specified in section 19 of the Presidency Small Cause Courts Acts, 1882, or, outside the Presidency-towns, is not of a kind specified in the Second Schedule to the Provincial Small Cause Courts Act, 1887, or to any proceeding in execution or other proceeding incidental to or arising from any such suit or claim.

Comments

The Partnerfhip Act neither makes the registration of a firm compulsory nor does it impose any penalties for non-registration as are imposed in England under the Registration of Business Names Act, 1916. However, it provides certain disabilities for an unregistered firm and the partners of such a firm or the partners whose names have not been shown as registered partners even though the firm is registered. Sub-section (1) provides that no suit can be instituted to enforce rights arising from a contract or conferred by the Partnership Act by any partner against his co-

partners or against the firm. Similarly, according to sub-section (2) no suit can be instituted to enforce any right arising from a contract by an unregistered firm against any third party. Sub-section (3) also provides that the disability mentioned in sub-sections (1) and (2) shall also apply to a claim of set-off or other proceeding to enforce a right arising from a contract. The idea behind making these provisions is that in their own interest the partners of a firm may get the firm registered and thereby the interests of the third parties with whom the firm may be dealing may be protected. The procedure for registration is very simple and the disabilities being too compelling that generally the partners would like to get the firm registered at one time or the other.

Effects of Non-Registration

1. Suits between partners and the firm

According to sub-section (1) no suit to enforce a right arising from a contract or conferred by the Partnership Act can be instituted in any Court unless the following two requirements are satisfied :—

(i) the partnership firm is registered ; and

(ii) The partner filing the suit has been shown in the Register of Firms as a partner of the firm. This provision bars a suit between partners or between partners and the firm if the firm is unregistered. Even if the firm is registered only such partners can sue whose names appear in the Register of Firms. Therefore, if some partners join after the firm with certain other partners has already been registered, unless the newly introduced partners are also shown in the Register of Firms, they suffer from the disability because only the registered partners can get benefit of the decree.[19]

The disabilities mentioned above are in respect of enforcing a contract or enforcing rights conferred by this Act. In case the basis of the claim of the plaintiff is an agreement creating the right independently of partnership business between him and the defendant that will not bar an action in the case even if the firm is unregistered. For example, when one partner is a creditor of another partner or of the partnership business, he may be allowed to bring an action for the same.[20]

In case the firm is unregistered and the partners are interested in enforcing their rights against their fellow partners or against the firm, the way out is to get the firm registered before the suit filed.

19. Chiman Lal v. Firm New Bndia Traders, A. I. R. 1962 Patna 25.
20. Inder Singh Sham Singh v. Brahma Deo Prasad, 1958, Bihar L. J. R. 608.

2. Suits between the firm and the third parties

According to sub-section (2) if the firm is unregistered, no suit to enforce a right arising from a contract can be instituted by the firm or its partners against a third party. Sub-section (2) also requires two conditions to be fulfilled before a suit can be instituted against a third party :—

(i) the firm must be a registered firm ; and

(ii) the persons suing must be shown in the Register of Firms as partners of the firm.

The disability is there for an unregistered firm and its partners if any contract is to be enforced against a third party. If the basis of the claim is wrongful detention of property and the action is under the Law of Torts and not for the breach of contract, the suit is maintainable and is not covered by the disability mentioned in Section 69 (2).[21] Similarly, a suit for recovery of price of goods obtained by fraud is maintainable because the action does not arise out of contract.[22]

As is obvious from sub-sec. (2), the disability is against an unregistered firm or its partners but it is not against the third party. Therefore a third party is not barred from bringing an action against an unregistered firm.

Claim of set-off or other proceeding

According to sub-section (3) the disabilities mentioned above also apply to a claim of set-off or other proceeding to enforce a right arising from a contract. For example, if a third party brings an action against the firm to recover some money, the firm cannot say that the third party also owes some money to the firm and, therefore, the claim of third party should be adjusted against the claim of the firm, which means the unregistered firm cannot claim a set-off.

The disabilites of sub-section (1) and (2) shall also apply to "*other proceedings*" to enforce a right arising from a Contract. In *Messers. Gap ulal Gordhandas* v. *Messers, Chunilal Shyam Lal*[23] it has been held that if an unregistered firm brings an action for the reduction of a rent against its landlord, such a suit to enforce a right arising out of a contract of tenancy is not maintainable because the suit falls under the disability mentioned in sub-section (3).

In *Jagdish Chand Gupta* v. *Kajaria Traders (India) Ltd.*,[24] the question arose whether the term "other proceedings' cover

21. Governor in Council v. Firm Bansidhar Prem Sukh, 1959, All. W. R. (H. C.) 18.
22. Shankaraling Nadar v. Ouseph Chacko, 1963 Ker. L. J. 387.
23. A. I. R. 1961 Raj. 286.
24. A. I. R. 1964 S. C. 1882.

arbitration proceedings also. The Supreme Court answered the question in the affirmative. In that case an agreement between two partners was that in case of any dispute between them the matter will be referred to arbitration. In accordance with the agreement one of partners appointed an arbitrator to which the other did not agree. An action was brought to enforce the agreement and the appointment of the arbitrator. The disagreeing partner contended that such a right of the other partner was not enforceable as the firm was unregistered. The Supreme Court held that the suit was not maintainable.

Exceptions

The disabilities discussed above are not applicable to the unregistered firm in the following exceptional cases :

1. Sec. 44 mentions certain circumstances under which on the suit of a partner the court may dissolve a firm. Sec. 69 (3) permits a suit even by the partners of an unregistered firm to sue for the dissolution of a firm or for the accounts of a dissolved firm. In case the firm has already been dissolved the partners of the unregistered firm can realise the property of the dissolved firm. This right includes enforcing a claim arising from contract prior to dissolution. The disability for non-registration works only during the subsistence of the partnership. After the firm is dissolved it is not the disability mentioned in sub-sections (1) and (2) of sec. 69 which governs the position. but it is the provisions of sec. 69 (3) which operate giving the partners power to "realise the property of the dissolved firm." In *Biharilal Shyamsunder* v. *Union of India*[25], the plaintiffs claimed damages for non-delivery of a bale of cloth despatched from Ahmadabad to Muzzafarpur through railway. The said action was brought after the dissolution of the firm whlch was unregistered. It was held by the Patna High Court that the partners of the dissolved firm are entitled to bring the suit for compensation from the railway for non-delivery of the consignment of cloth.

Any right or power to realise the property of the dissolved firm mentioned in sec. 69 (3) (a) not only means a right against a third party but it also includes a right against the partners of the dissolved firm as well.[26] In *Basantlal* v. *Chiranjilal*,[27] one partner of an unregistered firm sued the other partner after the dissolution for recovery of money in respect of accounts between them, it was held that such an action was maintainable after the dissolution of the firm.

25. A. I. R. 1960 Pat. 397; Baba Commercial Syndicate v. Channamasetti, A. I. R. 1968 A. P. 378 : Bhagwanji Morarji v. Alembic Chemical Works A. I. R. 1943 Bom. 385.

26. Basantlal v. Chiranjilal, A. I. R. 1968 Pat. 96, Sheo Dutt v. Pushi Ram, A. I. R. 1947 All. 229.

27. A. I. R. 1968 Pat. 96.

In *Navinchandra* v. *Moolchand*[28] it has been held that even a a suit for damages for misconduct brought by one partner against another after the dissolution of an unregistered firm would be permitted because the amount so realised should be divided between the partners and that is, therefore, the property of the dissolved firm.

2. Sec. 69 (3) (b) mentions another exception when an action could be brought on behalf of a partner against an unregistered firm. It provides that an official assignee, receiver, or Court have a power to bring an action to realise the property of the insolvent partner.

3. Sec. 69 (4) (a) exempts such firms from the operation of the provisions of this section whose place of business is not in India or whose place of business is in such areas, where because of notification under sec. 56, this Chapter does not apply. It has already been noted above that section 56 provides that the Government of any State may, by notification in the Official Gazette, direct that the provisions of this Chapter shall not apply to that State or to any part thereof specified in the notification.

4. Sec. 69 (4) (b) provides an exception for firms having small claims. If the value of the suit does not exceed Rs. 100/- an unregistered firm or its partners can bring an action against the third party.

Once the registration is made it would continue to be valid in the eyes of law until the same was canelled. If a firm was registered at a place in Pakistan before the partition of the country the registration would continue to be valid and, therefore, a suit in India after partition would be maintainable.[28] Similarly, there is no need of fresh registration on the death of a partner,[29] or when there is otherwise any change in the constitution of the firm.[30] In such cases it is sufficient to notify the Registrar about the change so that he could note the same in the relevant register.

Registration subsequent to the filing of the suit

If the firm is not registered "*no suit shall be instituted*" either between the partners *inter se* or against any third party In case the firm is unregistered such a suit shall be liable to dismissed. There is on specific provision in the Act for the dismissal of the suit *suo moto*. A plea for the dismissal of the suit on the ground of non-registration has to be made.[31] If the plaintiff admits that his suit is on behalf of an unregistered partnership, the Court must immediately dismiss the suit in view of the express and mandatory provisions of sec. 69.[32]

28. A. I. R. 1966 Bom. 111.
29 Bombay Cotton Export Import Co. v. Bharat Suryodhaya Mill Co. A. I. R. 1959 Bom. 307 ; Girdharmal v. Dev Raj A. I. R. 1963 S. C. 1587.
30. Durgadas Janak Raj v. Preete Shah Sant Ram, A. I. R. 1959 Punj-530 ; Kesrimal v. Dalichand, A. I. R. 1959 Raj. 140.
31. Dhanpal Patni v. Union of India, 1960 M. P. L. J. (Notes) 22.
32. Shriram v. Gourishankar, A. I. R. 1961 Bom. 136, at p. 141.

If the firm is not registered on the date of the filing of the suit the suit is liable to be dismissed. In view of the mandatory provisions of sec. 69 making registration a condition precedent to the institution of the suit, registration of the firm subsequent to the institution of the suit cannot cure the defeet. In *M/s. Jammu Cold Storage* v. *M/s. Khairati Lal and Sons*,[33] M/s. Kharati Lal and Sons instituted a suit to recover a sum of Rs. 1,000/- from M/s. Cold Storage and General Mills Ltd. on 15.4.1959. The firm was not registered on that day but it was got registered subsequently, on 30.5.1959. It was held by the J. &. K. High Court that since the firm was not registered on the date of the institution of the suit, the suit cannot proceed further and it must be dismissed.[34] When a suit has been dismissed on grounds of non-registration, a fresh suit after the registration of the firm is maintainable. The same is not barred as *res judicata* as the dismissal of a suit because of non-registration is not a decision of the case on its merits.[35]

70. Penalty for furnishing false particulars.—Any person who signs any statement, amending statement, notice or intimation under this Chapter containing any particular which he knows to be false or does not believe to be true, or containing particulars which he knows to be incomplete or does not believe to be complete, shall be punishable with imprisonment which may extend to three months, or with fine, or with both.

Comments

Information given to the Registrar through various documents filed with him in connection with the registration of a firm serves the purpose of making the third parties conversant with the firm and the partners. So that third parties dealing with the firm are not misled correct and complete information should be available with the Registrar. This section imposes penalty for making any false declaration in any document filed with the Registrar.

71. Power to make rules.—(1) The State Government may make rules prescribing the fees which shall accompany documents sent to the Registrar of Firms or which shall be payable for the inspection of documents in the custody of the Registrar of Firms, or for copies from the Register of Firms :

Provided that such fees shall not exceed the maximum fees specified in Schedule I.

(2) the "State Goverment" may also make rules—

(a) prescribing the form of statement submitted under section 38, and of the verificatlon thereof ;

33. A. I. R. 1960 J. & K. 101.
34. Also see Dwijendra Nath Singh v. Govinda Chandra A. I. R. 1953 Cal. 497 ; Prithvi Singh v. Hasan Ali, 1951 Bom. 6, for a similar view.
35. Sri Baba Commercial Syndicate v. Channamasetti, A. I. R. 1968 A. P. 378 ; Shanmugha v. Rathina A. I. R. 1948 Mad. 187.

(b) requiring statements, intimations and notice under sections 60, 61, 62, and 63, to be in prescribed form and prescribing the form thereof ;

(c) prescribing the form of the Register of Firms and the mode in which entries relating to firm are to be made therein and the mode in which such entries are to be amended or notes made therein ;

(d) regulating the procedure of the Registrar when disputes arise ;

(e) regulating the filing of documents received by the Registrar ;

(f) prescribing conditions for the inspection of original documents ;

(g) regulating the grant of copis ;

(h) regulating the elimination of registers and documents ;

(i) providing for the maintenance and form of an Index to the Register of Firms ; and

(j) generally, to carry out the purposes of this Chapter ;

(3) All rules made under this section shall be subject to the condition of previous publication.

CHAPTER VIII

SUPPLEMENTAL

72. Mode of giving public notice.—A public notice under this Act is given—

(a) where it relates to the retirement or expulsion of a partner from a registered firm, or to the dissolution of a registered firm, or to the election to become or not to become a partner in a registered firm by a person attaining majority who was admitted as a minor to the benefits of partnership, by notice to the Registrar of Firms under section 63, and by publication in the Official Gazette and in at least one vernacular newspapes circulating in the district where the firm to which it relates has its place or principal place of business, and

(b) in any other case, by publication in the Official Gazette and in at least one vernacular newspaper circulating in the district where the firm to which it relates has its place or principal place of business.

73. [Repealed]. *Repealed by Act I of 1938.*

74. Savings.—Nothing in this Act or any repeal effected thereby, shall affect or be deemed to affect—

(a) any right, title, interest, obligation liability already acquired, accrued, incurred before the commencement of this Act, or

(b) any legal proceeding or remedy in respect of any such right, title, interest, obligation or liability, or anything done or suffered before the commencement of this Act, or

(c) anthing done or suffered before the commencement of this Act, or

(d) any enactment relating to partnership not expressly repealed by this Act, or

(e) any rule of insolvency relating to partnership, or

(f) any rule of law not inconsistent with this Act.

SCHEDULE I

MAXIMUM FEES

[*See* sub-section [1] of section 71]

Document or act in respect of which the fee is payable	Maximum fee
Statement under section 58	Three rupees
Statement under section 60	One rupee
Intimation under section 61	One rupee
Intimation under section 62	One rupee
Notice under section 63	One rupee
Application under section 64	One rupee
Inspection of the Register of Firms under sub-section [1] of section 66	Eight annas for inspecting one volume of the Register
Inspection of documents relating to a firm under sub-section [2] of section 66	Eight annans for the inspection of all documents relating to one firm
Copies from the Register of Firms	Four annas for each hundred words or part thereof

SCHEDULE II :—[*Enactment Repealed*]. *Rep. by the Repealing Act, 1938* (*1 of 1938*), *S.* 2 *and Sch.*

Subject Index

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THE INDIAN PARTNERSHIP ACT

BY

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PREFACE

In this text-book an attempt has been made to explain various provisions of the Indian Partnership Act in a simple language. Up-to-date case law has been discussed to explain various principles.

The book is a section-wise commentary. So that the readers can have an idea of correllation between various provisions in any topic and also have a complete picture of the whole Chapter at a glance, "Introduction" to each Chapter has been given in the beginning of the Chapter.

I express my thanks to the publishers for their kind co-operation and preparing the Index and Table of Cases.

Any suggestions for the improvement of the book will be welcomed.

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Panjab University,
Chandigarh—160014.

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———

THE INDIAN PARTNERSHIP ACT

(Act IX Of 1932)

(Received the assent of the Governor-General on the 8th April, 1932.)

An Act to define and amend the law relating to partnership.

Whereas it is expedient to define and amend the law relating to partnership ; It is hereby enacted as follows :—

CHAPTER I

Preliminary

1. Short title, extent and commencement.—(1) This Act may be called the Indian Partnership Act, 1932.

(2) It extends to the whole of India except the State of Jammu and Kashmir.

(3) It shall come into force on the 1st day of October, 1932, except section 69, which shall come into force on the 1st day of October 1933.

Comments

Before the Indian Partnership Act, 1932, the law relating to partnership was contained in Chapter XI of the Indian Contract Act. This Act is not exhaustive. The Act purports to define and amend the law relating to partnership. The unrepealed provisions of the Indian Contract Act, except when they are inconsistent with the express provisions of the Partnership Act, still continue to apply to partnership firms.[1] Since partnership arises from a contract, the principles of the law of contract obviously apply to such a contract. It has also been expressly mentioned[2] that "nothing in this Act or any repeal effected thereby shall affect or be deemed to affect any rule of law not inconsistent with this Act."

2. Definitions.—In this Act, unless there is anything repugnant in the subject or context :

(a) an "act of a firm" means any act or omission by all the partners, or by any partner or agent of the firm which gives rise to a right enforceable by or against the firm ;

(b) "business" includes every trade, occupation and profession ;

1. S. 3.
2. S. 74 (f).

(c) "prescribed" means prescribed by rules made under this Act ;

(d) "third party" used in relation to a firm or to a partner therein means any person who is not a partner in the firm ; and

(e) expressions used but not defined in this Act and defined in the Indian Contract Act, 1872 shall have the meanings assigned to them in that Act.

Comments

"Act of a firm".—means any act or omission which gives rise to a right enforceable by or against the firm. Such act or omission may be by :

(i) all the partners, or

(ii) any partner, or

(iii) any agent of the firm.

An act of the firm, therefore, includes such act or ommision which gives rise to a right of action either in favour of the firm against a third party or in favour of a third party against the firm. It, therefore, means that if by any act or omission legal obligations between the firm and any third party are created that would be an act of the firm. Since a firm is bound by what may be done by all the partners, or by any partner acting on behalf of the firm or by an agent of the firm, any act or omission by such persons is an act of the firm. For example, one of the partners borrows money on behalf of the firm, or an agent purchases goods for the firm, or the firm sells goods to a third party, each one of these transactions is an act of the firm. An act of the firm not only includes any contract or other transaction which creates a right enforceable but also a wrongful act as well. For example, when one of the partners commits a tort against a third party,[3] or an agent commits a fraud[4] the firm can be made liable for the same. Some of the sections in which the term has been used are 25, 28 (2), 30 (7) and (8), 31 (2), 32 (2) & (3), 34 (2), 35 and 45 (1). Every partner is liable jointly with all the other partners and also severally, for all acts of the firm done while he is a partner.[5]

"Business".—According to the definition given in the Act it "includes every trade, occupation or profession". Carrying on of the business is one of the essentials of partnership. The term has been used in a very wide sense to cover all sorts of enterprises. It would include any activity which is aimed at making profits. However, when the object is not to purchase an article with an idea of reselling it and thereby making some profit but making a

3. Hmalyn v. Houston & Co., (1903) 1 K. B. 81.
4. Lloyd v. Grace, Smith & Co. (1919) A. C. 716.
5. Sec. 25.

bulk purchase and then jointly sharing by a number of persons the purchased article itself, it is not carrying on of business.[6]

3. **Application of provisions of Act IX of 1872.**—The unrepealed provisions of the Indian Contract Act, 1872, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to firms.

Comments

Partnership comes into existence only by a specific contract for the purpose. Although the rules peculiar to this type of contract are contained in a separate enactment since 1932 but still for general principles of the law of contract provisions of Indian Contract Act, in so far as they are not inconsistent with the provisions of this Act, are still applicable. For example, for rules relating to offer and acceptance, consideration, free consent, legality of object, etc. the provisions of Indian Contract Act have to be looked into. But since, regarding the position of a minor, specific provisions have been contained in S. 30 of the Act, the position of a minor, to that extent, is governed by the Indian Partnership Act.

6. Coope v. Eyre (1788) 2 R. R. 706 : 1 Bl. H. 37 ; Gibson v. Luptoning. 297.

CHAPTER II

The Nature of Partnership

Introduction

Partnership is a form of business organisation where two or more persons join together for jointly carrying on some business. It is more advantageous than a sole trade business as more capital and more skill can be made available for the business. In a way it is better than a joint stock company because in the formation and day to day running of the company many formalities are needed whereas for the creation of partnership and running of business no formalities are needed. Any two persons by an agreement can create partnership and they can run their business the way they like.

According to Sec. 4 partnership is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all. According to this definition the following essentials are needed to create partnership :—

1. An agreement ;
2. Carrying on of business ;
3. Sharing of profits ; and
4. Mutual agency.

1. Agreement

Two or more persons can create partnership by an agreement between themselves. Such an agreement may be express or it may be implied. Those associations the basis of which is not an agreement cannot be called partnerships. Sec. 5 clearly provides that the relation of partnership arises from contract and not from status. For example, the members of a Hindu undivided family carrying on family business as such do not become partners in that business because the basis of relation between the members of a joint Hindu family is the status of the persons, i. e., a person born in the family automatically becomes a member of the family since his birth. On the other hand, to create partnership a contract between the persons joining is a must.

Minimum number of persons who can join as partners is two. The Partnership Act does not lay down any limit as to the maximum number. The Companies Act, 1956, however, provides that in a banking business the maximum number of persons who can join in partnership is 10 and for any other business the maximum number is 20. If the number exceeds this limit it cannot be a legal part-

nership. If the number exceeds the abovestated limits then the persons joining have to form a company.

Since a contract is needed to create partnership all the partners must be competent to contract and, therefore, a minor cannot be a partner in partnership. Section 30 of the Act, however, permits a minor to be admitted to the benefits of partnership.

2. Carrying on business

The object of every partnership must be to carry on the business and to share its profits. Business includes every trade, occupation and profession. This virtually means any activity which is aimed at earning profits. If the object is to purchase goods and make profits by reselling them, this is carrying on of the business. However, if some persons join together to make bulk purchase of the article with a view to distribute such goods amongst themselves and thereby gain advantage of bulk purchase, this is not carrying on of the business (*Coope* v. *Eyre*).

3. Sharing of profits

Sharing of profits is an important essential of partnership. The associations like clubs or other societies whose object is not to make profits are not partnerships.

At one time it was thought that any person who shares the profits of a business is a partner but in 1860 in *Cox* vs. *Hickman* the House of Lords has held that although sharing of profits is an evidence of partnership but that is not the conclusive test. There may be persons sharing the profits of a business but they may not be partners.

Sec. 6 of the Act provides that in determining whether there is partnership between persons or not, regard must be had to the real relation between the parties, as shown by all relevant facts taken together. Merely because a person is sharing the profits of a business or is getting some payment contingent upon the earning of profits or varying with the profits earned by the business, does not of itself make such a person a partner in the business. There may be sharing of profits in the following situations and yet there may be no partnership :—

(i) Money-lender sharing the profits

Sometimes, a money-lender may be paid a share of profits until the loan given by him is paid back. Such a person does not become a partner merely because of the fact that he is sharing profits. In *Cox* vs. *Hickman* the firm of Smith & Son made an arrangement with the creditors. According to this arrangement five representatives of the creditors including Cox were appointed as five trustees to manage the business of Smith & Son and to distribute the profits amongst the creditors until all the creditors were fully paid off. While the business was in the hands of the

trustees one Hickman gave some credit to the firm and one of the trustees accepted bills drawn by Hickman undertaking to pay the price of those goods. Hickman brought an action against Cox and another trustee to recover the price of the goods supplied by him. It was held that even though Cox and other trustees were to manage the business and were also interested in sharing the profits yet the business continued to belong to Smith & Son only and such trustees had not become partners in the business. The action of Hickman, therefore, failed. Similarly, in *Mollwo & Co.* v. *Court of Wards*, the creditor of a firm got control over the business of his debtor and was also to share the profits of such business until the loan had been repaid. It was held that this creditor had not become a partner in the business.

(ii) Servant or an agent sharing profits

Sometimes, a servant or agent may be paid a share of profits so that he takes more interest in the business. Such a person merely because of sharing the profits does not become a partner.

(iii) Widow or the child of the deceased partner sharing the profits

Sometimes, if in pursuance of a contract between the partners legal representatives of a deceased partner are to share the profits of the business for a certain duration on behalf of the deceased partner, such persons sharing the profits do not become partners merely because they are sharing profits (*Holme* vs. *Hammond*). There is, however, no bar to the widow or the son of a deceased partner to enter into partnership after the death of the deceased but clear agreement to that effect has got to be proved.

(iv) Seller of goodwill sharing the profits

A person who sells the goodwill of a business may be paid the consideration for the sale of goodwill out of profits from time to time. Such a person, merely because of the fact of sharing profits, does not become a partner in the business.

4. Mutual agency

According to Sec. 4 the partnership business must be carried by all or any of them acting for all. This shows that there has to be mutual agency between partners. It means that every partner is the agent of the firm and, therefore, every partner can bind other partners by his act. A partner occupies the position both of the principal and the agent. He is agent in so far as others are bound by his act, he is also the principal since any other partner can bind him by his act. This is known as mutual agency between the partners.

We have noted above that a money-lender sharing the profits or an agent or a servant sharing the profits of a business does not become partner in the business merely because the profits are being shared. In such cases the reason for their not being part-

ners is that there is no mutual agency between such persons sharing the profits and the others.

Partners and Firm

Persons who have entered into partnership with one another are individually called partners and collectively a firm. A firm merely means all the partners joined together. In the eyes of law a firm is not a distinct legal person as a company is. A company is a separate legal entity different from its members but a partnership firm means only all the partners put together. In commercial world, however, the things are looked at from a different angle. In the books of accounts a partner may be shown as a creditor of the firm as regards the capital invested by him or he may be shown as debtor of the firm for what he may take out from the firm.

Distinction between Partnership and Joint Family

(1) The basis of partnership is a contract between persons whereas persons become members of a joint Hindu family because of their status *i. e.*, by their being born in a particular family.

(2) There is mutual agency between various partners but there is no such mutual agency between the members of a joint Hindu family. Karta has all the powers and is the only representative of the family.

(3) The liability of the partners is joint and several and is also unlimited but in case of coparceners their liability is only to the extent of their share in the family business.

(4) A partnership is dissolved by the death of a partner but that is not so in the case of joint Hindu family.

Distinction between Partnership and a Company

(1) A company is a separate legal entity different from its members but a partnership firm means all the partners of the firm put together.

(2) The minimum number of members in partnership is two and maximum in case of partnership carrying on banking business is 10 and in case of any other business is 20. In the case of a private company the minimum number is 2 and the maximum is 50 whereas in the case of a public company the minimum number of members shou'd be 7 but there is no limit to the maximum and, therefore, any number of members can hold shares in a public company.

(3) The liability of the members of a company is limited but the liability of the partners is unlimited.

(4) The shareholder of a company can transfer his share to anybody he likes but a partner cannot substitute another person in his place unless all the other partners agree to the same.

Partnership for a fixed term and Partnership at will

When the partners decide about the duration for which they have become partners it is known as partnership for a fixed term. Persons may also become partners for any particular adventure or a particular undertaking. For example, a number of persons join together to work a coal mine or to produce a film. The partnership in such a case continues until the adventure is completed or the undertaking continues. Such a partnership, according to Sec. 8, is known as particular partnership.

Where no provision is made by contract between the partners as regards the duration of partnership, according to Sec. 7, such a partnership is known as partnership at will. If the partnership is at will, any partner who wants to retire can do so by giving a notice in writing to all the other partners of his intention to retire. Similarly, in a partnership at will any partner interested in the dissolution of the firm can get the firm dissolved by giving a notice in writing to all the other partners of his intention to dissolve the firm.

4. Definition of partnership.—"Partnership" is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all.

"Partner", "firm" and 'firm name".—Persons who have entered into Partnership with one another are called individually "partners" and collectively "a firm" and the name under which their business is carried on is called the "firm name".

Comments

Definition of Partnership

Sec. 239, Indian Contract Act, defined partnership as follows:

" 'Partnership' is the relation which subsists between persons who have agreed to combine their property, labour or skill in some business, and to share the profits thereof between them."

The present section, which replaces sec. 239, Indian Contract Act, gives a wider definition than that provided earlier. It includes the important element of 'mutual agency' which was absent in the old definition.

According to Pollock "Partnership is the relation which subsists between persons who have agreed to share the profits of a business carried on by all or any of them on behalf of all of them."

The present Act adopts Pollock's definition with slight variation. Our definition omits the words 'which subsists' out of Pollock's definition, those words being considered as unnecessary.

Moreover, instead of the words 'all or any of them on behalf of all of them' the words 'all or any of them acting for all' have been used. These words convey the idea of mutual agency which is essential for every contract of partnership.

Section 4 requires the presence of the following essentials to constitute partnership.

1. An agreement,
2. Carrying on of business,
3. Sharing of profits, and
4. Mutual Agency.

When all the above four elements are present in a certain relationship that is known as partnership. The elements are discussed below in detail.

1. An agreement.—Partnership arises by an *agreement* between two or more persons to constitute partnership. Agreement here means a contract. Such an agreement may be express or implied, but the agreement, has to be there. If the basis of the relationship between certain persons is not an agreement the association would not be a partnership. Some associations may be created without an agreement e. g., the association between certain persons may arise from status as in the case of members of a Joint Hindu Family. Similarly two or more persons could become joint owners of some property by operation of law, for example, on the death of a father, two sons jointly inherit his business. The members of the Joint Hindu Family or the joint heirs in the above illustration cannot be called partners, the main reason being that their association is not the result of an agreement between those persons. To make the things further clear section 5 expressly provides that "the relation of partnership arises from contract and not from status". Thus it is the element of agreement which distinguishes a partnership from various other relationships like members of a joint Hindu family, joint owners or joint heirs. There is, however, nothing which debars these persons, i. e., the members of Joint Hindu family, joint heirs or joint legatees from constituting a partnership. For example, if two sons inherit the business of their father, they do not *ipso facto* become partners. They have acquired joint interest in the business, they may wind up the same and share the proceeds. However, if they agree, expressly or impliedly, to jointly continue that business, they will become partners. The position was thus explained in a decision of the Andhra Pradesh High Court[1]:

1. Jaldu Anantha Raghurama Arya v. Jaldu Bapanna Rao, A. I. R. 1959 A.P. 448, at p. 456; Also see Satteraju v. Pallamraju, A. I. R. 1919 Mad. 950: I. L. R. 41 Mad. 939.

"There can be no quarrel with the proposition that a co-ownership is not the same thing as partnership. The mere fact that the legatees or donees under a will or a deed *inter vivos* as the case may be, or heirs at law happen to have common interest in something which is divisible amongst them would not make them partners. But, if such persons continue the business either after the death of the testator or when the inheritance falls as the case may be it could not be postulated that there was no partnership.

They are not precluded from carrying on such a business. When the business is continued, there is an implied agreement amongst the various individuals having a common interest in the business."

Similarly, after disruption of a joint Hindu family, its members may form a partnership. If such members of the family on creating partnership agree that the business would be managed by only one of them or restrictions or limitations are placed on the rights of some of the partners or they do not get the firm registered under the Partnership Act for one year that does not necessarily vitiate the partnership.[2]

Since the partnership is the result of an agreement, atleast two persons are necessary to constitute a partnership. The Partnership Act does not mention any maximum limit as regards the mumber of persons who can be partners in a partnership firm. The maximum limit has, however, been fixed by The Companies Act, 1956. According to section 11 of that Act the maximum number of persons who can carry on Banking business in partnership is 10 and for any business other than Banking the maximum number of partners can be 20. If the number exceeds this limit the partnership becomes illegal. If more than 10 persons want to carry on a Banking business, or more than 20 persons want to carry on any other business they must do so by forming a company.

A partnership is a relationship between two or more persons arising out of contract between them.

Only those persons can be partners who are competent to contract. A minor being incompetent to co tract cannot become a partner. The Act, however, permits a minor to be admitted to the benfits of the firm.[3]

Partnership can arise between "persons". A partnership firm is not a legal person and, therefore, "a firm as such is not entitled to enter into partnership with another firm or individual."[4] The

2. Murlidhar Kishangopal v. The Commissioner of Income-tax M. P. A.I.R. 1964 M. P. 224; Also see Steel Brothers & Co. v. Commissioner of Income-tax, A. I. R 1958 S. C. 315.

3. For further details regarding the minor's position see notes on section 30.

4. Dulichand v. Commissioner of Income-tax, Nagpur, A. I. R. 1956 S.C. 354, at p. 358.

partners of firm can, however, enter into partnership in their *individual capacity* with another individual.[5]

The partnership arises between two or more *persons*. Persons may be natural or artificial. Thus there could be a partnership between a number of companies.[6] In *Ganga Metal Refining Company* v. *Commissioner of Income-tax, West Bengal*[7] the Calcutta High Court has expressed the view that though there is a possibility of an incorporated company forming partnership with another incorporated company in the loose sense of the term for the purpose of Income-tax, the regular concept of partnership cannot really be applied to say that an incorporated company under the Companies Act can enter into partnership with another incorporated company in the regular and technical sense.[8] P. B. Mukharji J., during the course of his judgment (at p. 434) stated that "Notionally and juristically if two incorporated companies under the Indian Companies Act enter into a partnership, then each company becomes the agent for the other and agrees to share the profits. This will create many problems for the two incorporated companies. The two companies will have to be, therefore, agents for each other in a manner which may not be permissible at all by their own charters articles and memorandum. It would be difficult to apply the very specific rights and obligations as between partners in the case of Companies as partners such as in Chapter III (Sections 9 to 17), Chap. IV (Sections 18 to 30), and Chap. VI (Sections 39 to 55), of the Partnership Act. Then there is need also for the registration of the firms and the companies as such partners in a partnership will have therefore, to, obey two masters, the Registrar of firms and Registrar of Companies. The access of each partner to the other partner's books of accounts will mean that one incorporated company would be entitled to get into the fields of accounts of the other incorporated company which is its partner. This will make nonsense of the Companies Act. Strangers then will have access to the books, accounts and papers of the companies whereas under the Companies Act, they are only limited to their own members and shareholders."

Partnership between a trust, represented by three persons, and an individual has been held to be valid.[9]

2. Carrying on of business.—The relationship between persons would be known as partnership when the object of their association was to carry on some business and to share its profits.

5. Commissioner of Income-tax, Bombay v. Jadavji Narsidas & Co., A. I. R. 1963 S. C 1497.

6. Steel Brothers and Co., Ltd. v. Commissioner of Income-tax, A. I. R. 1958 S. C. 315.

7. A I. R. 1967 Cal. 429.

8. Ibid., at p. 434.

9. Commissioner of Income-tax, West Bengal v. Juggilal Kamalapat, A. I. R. 1967 S. C 401 It has been held in Hossen Kasam v. Commissioner of Income-tax, (1941) Cal. W. N. 629 that since wakf is not a legal person, a partnership between a wakf and an individual is not vaild.

It may be any business which is not unlawful. The Act defines business as including "every trade, occupation or profession".[10] The definition is not exhaustive and is capable of including any kind of commercial activity. Purchasing goods with a view to make profits after selling them is a business transaction. But if a number of persons join together to make a bulk purchase of certain goods and divide the very goods amongst themselves with a view to have the benefit of bulk purchase such persons cannot be called partners although each one of them stands to gain something because purchasing goods without any idea of selling them is not carrying on of business. In *Coope* v. *Eyre*[11] there was an agreement between Eyre and Co. and others that Eyre & Co. should purchase some oil and distribute the same between itself and the other persons and others would then pay for the oil to Eyre and Co. at the purchase price. The purchase was made only in the name of Eyre & Co. without any notification to the plaintiffs that any other person had any concern in it.

Eyre and Co. having failed to pay, the question arose—could other parties, who had shared the oil, be held liable ?

It was held that there was no partnership between Eyre and Co. and others who shared the oil, as the oil was not purchased for resale, and thus they were not liable.

Heath, J. observed[12] : "Eyre & Co. are the only purchasers known to the plaintiffs ; entire credit was given to them alone. Pugh, Hattersley, and Stephens, can be liable only in the event of a concealed partnership, on this principle, "that the act of one partner binds all his co-partners, on account of the communion of profit and loss." In truth they were not partners, inasmuch as they were only interested in the purchase of the commodity and not in the subsequent disposition of it."

The business in respect of which the partners agree to carry on business must not be unlawful or opposed to public policy. It has been held by the Calcutta High Court in *Mahadeodas* v. *Gherulal Parekh*[13] a partnership where the partners agree to engage in forward contracts without an intention of actual delivery but only to deal in differences, the agreement is merely wagering. Such a partnership is valid because the wagering agreements though they have been merely declared void, they are not illegal, immoral or opposed to public policy. Wagering agreements are only void and not forbidden by law. A partnership agreement would be void if the business is forbidden by law, immoral or opposed to public policy within the meaning of section 23 of the Contract Act. Thus, where a partnership between two persons to

10. Sec. 2 (b).
11. (1788) 1 H. Bl. 37 ; 2 R. R. 706.
12. 2 R. R. at p. 710.
13. A. I. R. 1958 Cal. 703.

carry on business of transport service by obtaining permit in the name of one of them only involved the contravention of the provisions of sections 42 (1) and 59 (1), Motor Vehicles Act, the partnership is illegal and opposed to public policy. A claim on the basis of the settlement of accounts of such a partnership is also illegal and the same, therefore cannot be enforced.[14]

It is further necessary that the business must be *carried on* by all the partners or any one of them acting for all of them. Carrying on of a business involves a series of transactions. Merely a single isolated transaction of purchase and sale by a number of persons does not mean carrying on of the business. For example, A and B jointly purchase a building for a sum of Rs. 10,000 and after sometime they sell the building for Rs. 20,000 and share the gain of Rs. 10,000 equally. This transaction is not the carrying on of the business between A and B and, therefore, they are not partners. There is, however, possibility that the partners may engage in a single adventure or a single undertaking and that may involve the carrying on of a business. According to section 8 there can be "Particular partnership" between partners whereby they engage in particular adventures or undertakings. Thus, persons can be partners in the working out of a coal-mine or the production of a film because although that may be a single adventure but the same requires a series of transactions and continuing relationship. Similary, if a number of bales of yarn are purchased at one time, but the sales are to go on, profits are to be realised and then distributed amongst a number of persons, there is a carrying on of business.[15] The effect of distinction between a single transaction (also sometimes mentioned as single venture) and the carrying on of the business has been stated as follows.[16]

"A single venture or transaction finishes immediately after the purchase and the sale. There is no continuity or carrying on of the business", in the sense that one or more partners continue to have the responsibility and to apply their discretion, in buying, storing, selling and keeping charge of the moneys over a length of period. If this length of period, and the scope of the business are defined with reference to a particular season or to particular quantities of commodity, then we have a particular partnership. If in the agreement itself the period and the scope are not precisely defined, then we may call it a general partnership. Either way, it has to be a business, "carried on" with repetitions of the pro-

14. A. V. Varadarajulu Naidu v. K. V. Thavasi Nadar, A. I. R. 1963 Mad. 413 ; Velu Padayachi v. Sivasooriam Pillai, A. I. R. 1950 Mad. 444 : I. L. R. (1950) Mad. 987 ; Maniam Hiria Gowder v. Naga Maistry, A. I. R. 1957 Mad. 620 : (1957) 2 Mad. L. J. 264 ; Visivanatha v. Namakchand Gupta, (1954) 2 Mad. L. J. 782 ; Kanniappa Nadar v. Karuppiah Nadar, A. I. R. 1962 Mad. 240 : I. L. R. (1962) Mad. 441.

15. Senaji Kapurchand v. Pannaji Devichand, A. I. R. 1930 P. C. 300 ; Nathi Lala v. Sri Mal, A. I. R. 1940 All. 230.

16. Ram Dass v. Mukut Dhari, A. I. R. 1952 V. P. 1. at p. 3.

cess of purchasing and selling, and keeping charge of the commodities and the moneys."

3. **Sharing of profits.**— The object of every partnership must be to carry on business for the sake of profits and to share the same. Therefore, clubs or societies which do not aim at making profits are not partnerships. The term "profits" has not been defined in the Act. It means net gain, i. e., the excess of returns over outlay.

Although sharing of profits is one of the essential elements of every partnership but every person who shares the profits need not always be a partner. For example, I may pay a share of profits to the manager of my business instead of paying him fixed salary so that he takes more interest in the progress of the business, such person sharing the profits is simply my servant or agent but not my partner. Similarly, a share of profits may be paid by a business man to a money lender by way of payment towards the return of his loan and interest thereon, such a money-lender does not thereby become a partner. At one time it was thought that a person who shared the profits must incur the liability also as he was deemed to be a partner. This rule was laid down in *Grace* v. *Smith*[17] in 1775 and it was stated by Grey C. J. that "every man who has the share of the profits of a trade ought also to bear his share of the loss." This principle was confirmed in 1793 in *Waugh* v. *Carver*.[18] In 1860 this question came for consideration before the House of Lords in *Cox* v. *Hickman*.[19] In that case it was laid down that the persons sharing the profits of a business do not always incur the liability of partner unless the real relation between them is that of partners.

The facts of *Cox* v. *Hickman* are as under :

Smith and his son carried on business as Smith & Son. They got into financial difficulties as a consequence of which they executed a deed of arrangement with the creditors. According to the arrangement five representatives of the creditors were appointed as five trustees. They included Cox and Wheatcroft. The business of Smith and Son was to be managed by the five trustees. The net income of the business was to be distributed by these trustees amongst the general creditors of Smith & Son. After all the creditors had been paid off the business was to be returned to Smith & Son. While the business was being managed by the trustees, the plaintiff, Hickman, supplied goods to the firm. One of the trustees accepted bills of exchange drawn by Hickman undertaking to pay the price of those goods. Hickman sued Cox and Wheatcrof to recover the price of the goods supplied by him.

The House of Lords held that although Cox and Wheatcroft

17. (1775) 2 Wm. Blacks, 998.
18. (1793) 2 H. Blacks. 235 : Smith's L. C.
19. (1860) 8 H. L. C. 268 : 125 R. R. 148.

were appointed trustees to manage the business but they had not thereby become partners and as such they were not liable to Hickman. Discussing the position of a person sharing the profits Lord Cranworth observed :[20]

"It is not strictly correct to say that his right to share in the profits makes him liable to the debts of the trade. The correct mode of stating the proposition is to say that the same thing which entitles him to the one makes him liable the other, namely, the fact that the trade has been carried on, on his behalf, i. e., that he stood in the relation of principal towards the persons acting ostensibly as the traders, by whom the liabilities have incurred, and under whose management the profits have been made.

Taking this to be the ground of liability as a partner, it seems to me to follow that the mere concurrence of creditors in an arrangement under which they permit their debtor, or trustees for their debtor, to continue his trade, applying the profits in discharge of their demands, does not make them partners with their debtors, or the trustees. The debtor is still the person solely interested in the profits, save only that he has mortgaged them to his creditors. He receives the benefit of the profits as they accrue, though he has precluded himself from applying them to any other purpose than the discharge of his debts. The trade is not carried on by or on account of the creditors ; though their consent is necessary in such a case, for without it all the property might be seized by them in execution. But the trade still remains the trade of the debtor."

Sharing of profits, therefore, although may be an evidence of partnership between some persons but that is not the conclusive test. Sec. 6 mentions that in order to determine the existence of partnership all the relevant facts should be taken into consideration. It provides that "in determining whether a group of persons is or is not a firm, or whether a person is or is not a partner in a firm, regard shall be had to the real relation between the parties, as shown by all relevant facts taken together. "Explanation II to the section says that the receipt of a share of profits or a payment which is contingent upon earning the profits does not of itself make such a person receiving the money as partner. A moneylender may be repaid the loan out of profits, or a servant or agent may be paid his remuneration for services out of profits, or widow or child of a deceased partner may be entitled to some annuity in pursuance of agreement between the partners, or a person who has sold his business or goodwill may be paid the sale price out of profits, such persons thus sharing the profits do not thereby become partners with the persons whose profits they are sharing.

4. Mutual Agency.—Existence of mutual agency is also

20. (1860) 8 H. L. C. 268, at p. 306 : 125 R. R. 148, at P. 168.

essential to constitute partnership. According to section 4 the partnership "business must be carried on by all or any of them acting for all." It enables any partner to carry on the business on behalf of others. Every partner, therefore, can bind others by his act done on behalf of the firm. Every partner can be agent of any other partner and that relationship is that of mutual agency. For example, a partnership consists of A and B. A may enter into a contract on behalf of the firm and thereby make B bound by the agreement. In this transaction A is the agent and B the principal. Similarly, B may borrow money for the firm and A would be bound thereby. In this transaction B acts as agent and A is bound as principal. We thus find every partner occupies the dual position, that of the principal and agent. He is agent in so far as others are bound by his acts and he is also the principal in so far as he is bound by what is done by others. This position of mutual agency is to be there in every partnership. In *Cox* v. *Hickman*[20a] we have already noted that although the trustees were managing the business of Smith and Son but they did not thereby become partners. The reason is that the trustees were agents of the Smith & Son but they were not the principals and thus there was no mutual agency. Smith & Son were the principals and the business still belonged to Smith & Son and not to trustees. Similarly, if the servant or agent is paid remuneration out of profits, such a person constitutes merely an agent of the person with whom he is sharing the profits. Since such a servant or agent is not also the principal there is no mutual agency and thus the servant or agent sharing the profits cannot be termed as a partner.

Partners and firm

Persons who have entered into partnership with one another are individually called partners and collectively "a firm". In the eyes of law, therefore, firm is not a separate legal entity distinct from its members. It is merely a collective name of the individuals who have entered into partnership. Unlike a company which is a separate legal enity distinct from its members and also a legal person, a firm is neither anything distinct from its members nor it is a legal person. According to Order XXX, Code of Civil Procedure, suits could be brought against the firm, but that simply means a suit against the partners of that firm.

In commercial world the things are looked at in a different way. There the firm is deemed to be something different from its members who constitute it. In partnership accounts the firm is shown as a debtor towards the partners in respect of the capital which they bring in or any other amount brought by them in the firm and similarly, the partners may be shown as debtors to the firm for what they take out of the firm. In mercantile view the firm and the partners may be debtors and creditors to each other

20-a. (1860) 8 H. L. C. 268 : 125 R. R. 148.

rather than the partners being debtors and creditors of one another, so far as the business of the firm is concerned.

The name under which the business of the firm is carried on is called the "firm name". The partners are free to choose any name for the firm subject to the rules concerning goodwill and trade names. The name must not be such as misleads the public in confusing it with other firms which may be already carrying business under the same or like names. A firm name must not have words like Crown, Emperor, Empress, Empire, Imperial, King, Queen, Royal, or words expressing or implying the sanction, approval or patronage of Government, except when the State Government signifies its consent to the use of such words as part of the firm name by order in writing."[1]

5. Partnership not created by status.—The relation of partnership arises from contract and not from status ;

and, in particular, the members of a Hindu undivided family carrying on a family business as such or a Burmese Buddhist husband and wife carrying on business as such, are not partners in such business.

Comments

We have already noted that a partnership arises by an agreement. According to section 4 an agreement is one of the essentials needed to create partnership. The basis of the relationship between the members of the joint Hindu family being their status, this section makes it clear that the members of a Hindu undivided family carrying on a family business as such are not partners in the joint family business.

Distinction between Partnership and Joint Family

(1) The relation between various partners in a partnership firm arises by a contract between them. Family is created by operation of law. A person becomes a member of the family by status, *i. e.*, by being born in a particular family. When a new partner is to be admitted to the partnership that is possible only with the consent of all the partners.

(2) There is mutual agency between various partners, but that is not so in the case of members of a joint Hindu family. In the case of family all the powers are vested in the Karta and he is the only representative of the family.

(3) The liability of the partners is joint and several and that is also unlimited. The liability of the partners is not limited to the extent of their share in the firm, they can also be made personally liable. In case of co-parceners their share in the family

1. Sec. 58 (9).
2.

business is liable and they do not incur personal obligations in the family business.

(4) A partnership is dissolved by the death of a partner but that is not so in the case of death of a co-parcener.

6. Mode of determining existence of partnership.—In determining whether a group of persons is or is not a firm, or whether a person is or is not a partner in a firm regard shall be had to the real relation between the parties, as shown by all relevant facts taken together.

Explanation 1.—The sharing of profits or of gross returns arising from property by persons holding a joint or common interest in that property does not of itself make such persons partners.

Explanation 2.—The receipt by a person of a share of the profits of a business or of a payment contingent upon the earning of profits or varying with the profits earned by a business, does not of itself make him a partner with the persons carrying on the business ;

and, in particular, the receipt of such share or payment—

(a) by a lender of money to persons engaged or about to engage in any business,

(b) by a servant or agent as remuneration,

(c) by the widow or child of a deceased partner as annuity, or

(d) by a previous owner or part owner of the business, as consideration for the sale of the goodwill or share thereof,

does not of itself make the receiver a partner with the persons carrying on the business.

Comments

We have already noted that to constitute partnership all the essentials mentioned in section 4 of the Act have to be there. One of the essentials is sharing of profits as between the partners. This section gives a caution that the presence of merely some of the essentials need not necessarily mean that there is a partnership. In determining whether there is partnership or not, regard shall be had to the real relation between the parties, as shown by all relevant facts taken together. Explanation 1 makes it clear that sharing of profits between certain persons does not of itself make such persons partners.

Explanation 2 mentions four particular instances where a person may be sharing the profits with another, or may be getting some payment contingent upon or varying with the profits and still

the real relation between the persons thus sharing the profits may not be that of partners.

1. Money-lender sharing the profits.

At one time it was thought that a person sharing the profits must also incur the liability of a partner.[22] In 1860 the House of Lords in *Cox* v. *Hickman*[23] laid down that it would not be correct to infer partnership from the mere fact that certain persons are sharing profits. It has to be seen as to why a person is sharing profits and what is the real relationship between the persons sharing the profits. In *Cox* v. *Hickman* the firm of Smith & Son got into financial difficulties. They executed a deed of arrangement with their creditors. According to this arrangement five representatives of the creditors, known as the trustees, were to manage the business of Smith & Son and to apply the profits in payment of amount due to the creditors. After the creditors had been paid off the business was again to be handed over to Smith & Son. The trustees included Cox and Wheatcroft. The plaintiff, Hickman, supplied goods to the firm while the business was being managed by the trustees and one of the trustees accepted bills drawn by Hickman undertaking to pay for the goods. Hickman sued Cox and Wheatcroft to recover the price of the goods supplied by him. It was held that although the creditors were sharing the profits and the business was being managed by the trustees, still the relationship between Smith and Son on the one hand and the creditors (including trustees) on the other was that of debtor and creditor and not that of partners and, therefore, Cox and Wheatcroft could not be made liable.

In *Mollwo March & Co.* v. *Court of Wards*,[24] a Hindu Raja advanced large sums of money to a firm. The Raja was given extensive powers of control over the business and he was to get commission on profits until the repayment of his loan with 12 per-cent interest thereon. It was held that the Raja could not be made liable for the debts contracted by the firm while the said agreement was in force, because the intention in the agreement was not to create partnership but simply to provide security to Raja, who had lent money to the firm.

2. Servant or agent sharing the profits.

Sometimes a share in the profits may be given to a servant or agent in the business so that he can take more interest in the business. Such a person sharing the profits in that capacity does not thereby become a partner. In *McLaren* v. *Verschoyle*,[25] an assistant in a firm of brokers was paid a share in the profits over and above his salary. At times he signed some letters and docu-

22. Grace v. Smith, (1775) 2 Wm. Blacks. 998 ; Waugh v. Carver, (1793) 2 H. Blacks. 235.
23. (1860) 8 H. L. C. 268 : 125 R. R. 148.
24. (1872) L. R. 4 P. C. 419.
25. (1901) 6 Cal. W. N. 429.

ments on behalf of the firm. It was held that such a servant only acted as an agent for the firm and the mere fact that he shared the profits did not make him a partner in the firm. Similarly, in *Munshi Abdul Latif* v. *Gopeswar*,[26] A, who had undertaken to load and unload railway wagons for a limited company, appointed B to do that job. B was to be paid 75 per cent of the profits and was also liable for the losses, if any. It was held that the relationship between A and B was that of principal and agent and not partners.

3. Widow or child of a deceased partner sharing profits.

Sometimes on the death of a partner the widow or the child of the deceased partner may be given a share of profits in accordance with an agreement which may have been entered into between the partners. Such widow or child does not become the partner merely because he or she is sharing the profit in the business.

In *Holme* v. *Hammond*[27], 5 persons entered into partnership for 7 years and agreed to share the profits and losses equally. They further agreed that if any one of them died before the expiry of the said period of 7 years, the others would continue the business and pay the share of the profits of the deceased to his executors. On the death of one of the partners the survivors continued the business. The executors of the deceased, who did not actually take any part in the management of the business, were paid 1/5th share of profits made since the death of the deceased. The plaintiff sued the executors of the deceased to make them liable in respect of a contract entered into by the surviving partners after the death of the deceased partner. It was held that the executors, though sharing the profits, had not become partners and, therefore, they could not be made liable.

There is no bar to the widow or the son of a deceased partner to enter into partnership after the death of the deceased, but a clear agreement to that effect has to be proved.[28]

4. Seller of goodwill sharing the profits.

A person selling the goodwill of his business may be entitled to share the profits of a business in consideration for the sale of goodwill, such a person will not become a partner merely because he is sharing the profits with the person carrying on such business. In *Pratt* v. *Strick*[29], a doctor sold the goodwill of medical practice and entered into an agreement with the buyer of the goodwill that

26. A. I. R. 1933 Cal. 204 : (1932) 56 Cal. L. J. 172.
27. L. R. 7 Ex. 218.
28. Commissioner of Income-tax v. M/s. Kedarmall V. Keshardeo, A.I.R. 1968 Assam & Nagaland 68.
29. (1932) 7 Tax Cas. 459. Rowlinson v. Clarke, 15 M. & W. 292; Hawksley v. Outram, (1892) 3 Ch. 359.

he would help such buyer to introduce patients for 3 months and he would be entitled to half the share of profits and incur half the expenses. It was held that the doctor had not become a partner with the person to whom the goodwill was sold.

7. **Partnership at will.**—Where no provision is made by contract between the partners for the duration of their partnership or for the determination of their partnership, the partnership is "partnership at will."

Comments

Partners are free to agree as to how long partnership between them will continue. If they decide the duration of partnership, it is known as parnership for a fixed term. This section provides that where there is no provision in the contract between the partners for the duration of their partnership, the partnership is a partnership at will. In case the partnership is at will, obviously the partners do not bind themselves to remain partners with each other for any specific period. They are' in such a case, free to break their relationship at their sweet will. Sec. 32 (1) (c) provides that where the partnership is at will, a partner may retire by giving a notice in writing to all the other partners of his intention to retire. Similarly, in case of partnership at will, dissolution of the firm can be sought by any partner by giving a notice in writing to all others. Section 43 provides that where the partnership is at will, the firm may be dissolved by any partner giving notice in writing to all the other partners of his intention to dissolve the firm. The firm is dissolved as from the date mentioned in the notice as to the date of dissolution or, if no date is so mentioned, as from the date of the communication of the notice.

If the agreement contains any provision which is inconsistent with the partnership at will. e. g., retirement is not possible at the sweet will of a partner but notice of a certain duration is needed before a partner can retire, or, dissolution can be possible only under special circumstances, such a partnership is not a partnership at will.

8. **Particular partnership.**—A person may become a partner with another person in particular adventures or undertakings.

Comments

This section contemplates existence of partnership in respect of a particular adventure or undertaking e. g., there may be partnership for working a coalmine or producing a film. The section makes it clear that single adventure or undertaking would constitute "business" as defined in S. 2 (b) of the Act.

CHAPTER III

RELATIONS OF PARTNERS TO ONE ANOTHER

Introduction

This chapter deals with mutual relations between the partners *i. e.*, the rights and duties of the partners *inter se*. Sec. 11 (1) provides the general rule that the partners are free to regulate their mutual rights and duties by a contract between themselves. Such contract may be express or it may be implied. This rule is subject to the provision of this Act. Sections 12 to 17 in this Act lay down various rights and duties of the partners and all these provisions are subject to contract between the partners. Some duties have been mentioned in Secs. 9 and 10. These two sections are not subject to contract between the partners and, therefore, the duties mentioned therein are applicable to all partnership. The following are the rights and duties of the partners mentioned in this chapter.

Rights of the Partners

1. Right to take part in the management

According to Sec. 12 (a) every partner has a right to take part in the conduct of the business of the firm. Since the business belongs to all the partners in the firm, no partner can be debarred from taking part in the management.

2. Right to express opinion

According to Sec. 12 (e) any difference arising as to ordinary matters connected with the business may be decided by a majority of the partners. For matters of fundamental importance, for example, in case a change in the nature of business is to be made or a new partner is to be admitted, consent of all the partners is necessary. Every partner has been empowered to express his opinion before the matter is decided. Therefore, even though in ordinary matters the decision of the majority of the partners would prevail but they are bound to consult every partner before the decision is taken.

3. Right to have access to books of the firm

According to Sec. 12 (d) every partner has a right to have access to and to inspect and copy any books of the firm. This right is available to both active and dormant partners. This right is not only in respect of books of accounts but in respect of any books of the firm. The partner could exercise this right either personally or by engaging an agent for the purpose.

4. Right to share profits

The object of any partnership is to share the profits of a business. The partners are free to decide about the proportion in which they will be sharing the profits and losses. In case the partners have not made any agreement to that effect, according to Sec. 13 (b) the partners are entitled to share equally in the profits earned, and shall contribute equally to the losses sustained by the firm.

Unless otherwise agreed a partner is not entitled to receive remuneration for taking part in the conduct of the business. If any partner devotes more time in the business than others, the partners are free to agree that such a partner would be getting some additional salary, commission etc. for such work done by him.

5. Right of interest on capital and advances

Generally no interest on capital subscribed by the partner is to be given because the partners share the profits of the business of the firm. In case the partners agree that interest on capital is to be given, according to Sec. 13 (c) such interest shall be payable only out of profits.

Sometimes over and above the capital subscribed by the partners the firm may need extra money. In case a partner makes any payment or advance beyond the amount of capital he has agreed to subscribe, he is entitled to interest thereon at the rate of six per cent per annum, according to Sec. 13 (d).

6. Right to indemnity

A partner while acting on behalf of the firm may make certain payments and also incur some liabilities. According to Sec. 13 (e), he is entitled to claim indemnity for the same. The indemnity can be claimed for the acts done by a partner in the ordinary and proper conduct of the business and also for doing some act in an emergency for the purpose of protecting the firm from the loss.

Duties of the partners

1. Duty to carry on the business to the greatest common advantage

Partnership is based upon mutual confidence and trust. It is, therefore, necessary that no partner should gain any personal advantage at the cost of others. One of the duties mentioned in Sec. 9 is that partners must carry on the business to the greatest common advantage. This provision is to be read with Sec. 16 (a), which provides that if any partner derives any profits for himself from any transaction of the firm, or from the use of the property or business connection of the firm or the firm name, he shall account for that profit and pay it to the firm. In *Bentley* v. *Craven* one of the partners of a firm of sugar refineries was assigned the duty of purchasing sugar from the market for being refined. He,

instead of purchasing sugar from the market for the firm, supplied his own sugar which he had purchased earlier at a lower price. It was held that this partner was not entitled to keep this profit with himself.

2. Duty to be just and faithful to each other

Another duty mentioned in sec. 9 is that the partners must be just and faithful to each other. There is mutual agency between the partners and the act of one partner binds all others. It, therefore, becomes the duty of the partners that they perform their functions with utmost fairness. Sec. 33 expressly provides that while expelling a partner from the firm the other partners must exercise this power in good faith. Similarly, good faith is also needed when an active partner acts on behalf of a sleeping partner or one partner purchases the share of another partner. In case a partner betrays confidence, he is accountable for the same.

3. Duty to render true accounts and full information

It is the duty of a partner to keep and render true and complete accounts of all partnership moneys with him. Since every partner has a right to have access to the accounts of the firm, such accounts must be made available whenever so required.

Every partner is an agent of the firm. According to the law of agency information to the agent is deemed to be information to the Principal. Sec. 9 makes it incumbent on every partner to pass on full information of all things affecting the firm to his other fellow partners.

4. Duty to indemnify for fraud

A firm is liable towards the third party for any fraud or wrongful act or omission of a partner done in the ordinary course of the business of the firm. Sec. 10 provides that if a partner commits a fraud against a third party and the third party makes the firm liable for the same, the guilty partner is bound to indemnify the firm for the loss thus caused to the firm. This provision is mandatory and not subject to the contract between the partners. A partner, therefore, cannot contract himself out of the liability stated above.

5. Duty to be diligent

According to Sec. 12 (b) every partner is bound to attend diligently to his duties in the conduct of the business of the firm. Sec. 13 (f) further provides that if any loss is caused to the firm by the wilful negiect of a partner in the conduct of the business of the firm, such partner shall indemnify the firm for the loss.

6. Proper use of firm's property

According to Sec. 15 the property of the firm shall be held and used by the partners exclusively for the purpose of business

of the firm. Sec. 16 (a) provides that if a partner derives any profit for himself from any transaction of the firm or from the use of the property or business connection of the firm or the firm name, he shall account for that profit and pay it to the firm.

7. Duty not to compete

It has been provided in Sec. 11 (2) that even though according to the Indian Contract Act an agreement in restraint of trade is void, the partners are free to make a contract that a partner shall not carry on any business other than that of the firm while he is a partner. In case they agree to that effect a partner carrying on any other business can be restrained through an injunction. In case no such restriction is imposed by a contract between the partners, a partner would be free to carry on other business also than that of the firm. If the other business is of the same nature as and competing with that of the firm, according to Sec. 16 (b), a partner carrying on such a business shall account for and pay to the firm all profits made by him in that business. It obviously implies that if carrying on other business is not barred by an agreement between the partners and the other business carried by a partner is of a different nature and not competing with the firm, the partner is entitled to keep the profits of that business with himself.

There may be some changes in the firm. Sec. 17 contemplates the following three changes and provides that inspite of the changes the mutual rights and duties of the partners remain the same, unless the partners by an agreement prefer to change the same.

(i) Change in the constitution of the firm

A change in the constitution of the firm may occur either when a new partner is introduced or some partner ceases to be a partner by retirement, expulsion, insolvency or death. The mutual rights and duties of the partners continue to be the same inspite of the change.

(ii) Business carried on after the expiry of the term

In case the firm was constituted for a fixed term but the business is continued even after the expiry of the term, the mutual rights and duties of the partners will continue to be the same.

(3) Carrying out of additional undertakings

A firm may have been constituted for one or more specific adventures or undertakings. In case a firm carries out other adventures or undertakings also, the mutual rights and duties of the partners will continue to be the same.

9. General duties of partners.—Partners are bound to carry on the business of the firm to the greatest common advantage, to

be just and faithful to each other, and to render true accounts and full information of all things affecting the firm to any partner or his legal representative.

Comments

This Chapter deals with the relations of partners to one another, i. e., their mutual rights and duties. Sec. 11 (1) provides that the partners themselves may decide about their mutual rights and duties by a contract between themselves. Ss. 12 to 17 lay down rules regarding their mutual rights and duties and all these provisions are subject to contract between the partners. Ss. 9 and 10 lay down certain duties by which all the partners are bound. The duties mentioned in this section are as under :

(1) To carry on the business to the greatest common advantage ;

(2) To be just and faithful to each other ;

(3) To render true accounts ; and

(4) To render full information of all things affecting the firm.

1. Duty to carry on the business to the greatest common advantage

Every partner should act to the greatest common benefit of all the partners rather than gaining any personal advantage at the expense of others. This provision has to be read with section 16 (a) of the Act according to which if a partner derives any profit for himself from any transaction of the firm, or from the use of the property or business connection of the firm or the firm name, he shall account for that profit and pay it to the firm. Thus, if a partner makes any secret profit out of any transaction of the firm or instead of procuring a contract to the advantage of parnership firm makes the contract in his own name, or instead of selling the firm's goods to a third party purchases them at a lower price himself, or instead of purchasing goods from the market sells his own goods to the firm and thereby gains personal advantage, he cannot keep that benefit with himself. He is bound to account for that profit to the firm.

In *Bentley* v. *Craven*[1], a firm which had been established for refining sugar consisted of four parners. One of the partners, who was considered to be expert in the job, was authorised to purchase sugar for the firm for refining. Instead of purchasing sugar from the market he supplied his own sugar, which he had purchased earlier at much lower price and thus made considerable profit. He did not disclose this fact to other partners that he was making profit in this particular transaction. It was held that the firm was entitled to recover the profit thus made by this partner.

1. (1853) 18 Beav. 75 : 104 R. R. 373.

In *Gardener* v. *McCutcheon*[2], a number of persons were the joint owners of a ship which was to be employed for their common benefit. One of them, who was the master of the ship, traded on his own account and made considerable profit. It was held that the defendant was not entitled to use the partnership property for his private benefit and, therefore, he was bound to account for that profit to the other co-partners.

2. Duty to be just and faithful to each other

Persons enter into partnership with others on the basis of their mutual confidence and trust. There is mutual agency between the partners and every partner is the agent of all others and he can bind them to an unlimited extent. Every partner is therefore, expected to be just and faithful to his co-partners. The partners must perform their functions with utmost fairness. Thus, sec. 33 provides that even if the contract between the partners authorises the expulsion of a partner, the fellow partners must exercise this power in good faith. Similarly, when a partner purchases the share of another partner or a working partner is acting on behalf of a sleeping partner, or there is a transaction in which a partner is likely to gain an advantage at the cost of others, there is a need for good faith. If a partner betrays confidence reposed in him and gains any personal advantage at the cost of other partners he is accountable for the same. In case a partner is guilty of a conduct which destroys mutual confidence, e. g., one partner commits adultery with another partner's wife, can be a ground on which the court may order dissolution of the firm.[3]

3. Duty to render true accounts

Every partner is bound to keep and render true and complete account of all the partnership moneys with him. He also must make these accounts available to the other partners because every partner has a right to have access to and to inspect any copy any of the books, including the account books of the firm[3]. The partnership funds in the hands of a partner must be spent by him properly for the purpose of the firm's business and the partner concerned should keep proper vouchers in respect of the expenses. He should not mix up his money with that of the firm nor should he wrongly spend or misappropriate the firm's money, otherwise he will be accountable for the same towards the firm.

4. Duty to render full information of all things affecting the firm

Partnership is based upon mutual confidence and trust. Utmost good faith is needed in relation between the partners. Every partner is also an agent of the firm. It is, therefore, expected that whatever information a partner obtains concerning the firm, he

2. Abbot v. Crump (1870) 5 Beng. L. R. 109.
3. Sec. 12 (d).

will not conceal it from the other copartners but will pass on that information to all the partners. If a partner having knowledge of material facts with regard to the partnership assets purchases the share of a co-partner in the firm's assets without disclosing those material facts the contract is voidable. In *Law* v. *Law*.[4] it has been held that is a partner, who is entitled to repudiate the contract on the ground of concealment of facts by the other copartner does not insist on full disclousure, but rather agrees to the modification of the original bargain, such a partner cannot subsequently repudiate the contract.

10. Duty to indemnify for loss caused by fraud.—Every partner shall indemnify the firm for any loss caused to it by his fraud in the conduct of the businss of the firm.

Comments

The firm is liable not only for the contract made by one of them on behalf of others but also for wrongful act or omission of a partner acting in the ordinary course of business of the firm. If a partner commits a fraud against a third party while acting in the ordinary course of business of the firm, the third party can make the firm liable for the same. This section entitles the firm to recover indemnity from the partner guilty of fraud because of which the firm had to suffer the loss. Unlike the provisions of sections 12 to 17, the duty mentioned in this section is not subject to the contract between the partners. It is, therefore, not possible for a partner to negative his liability towards the firm for loss caused to the firm due to his fraud. This section in absolute terms provides that every partner shall indemnify the firm for any loss caused to the firm by his fraud in the conduct of the business of the firm and leaves no scope for the guilty partner to control himself out of such liability.

11. Determination of rights and duties of partners by contract between the partners.—(1) Subject to the provisions of this Act, the matual rights and duties of the partner of a firm may be determined by contract between the partners, and such contract may be expressed or may be implied by a course of dealing.

Such contract may be varied by consent of all the partners, and such consent may be expressed or may be implied by a course of dealing.

(2) Agreement in restraint of trade.—Nothwithstanding anything contained in section 27 of the Indian Contract Act, 1872, such contracts may provide that a partner shall not carry on any business other than that of the firm while he is a partner.

Comments

This section incorporates the general principle that subject to

4. (1905) 1 Ch. 140.

the provisions of this Act the partners are free to make any agreement they like to govern their mutual rights and duties. Accordingly, the provisions of sections 12 to 17, 20 and 42 have been expressly made subject to contract between the partners. Provisions of sections 9 and 10, however, are not subject to the contract. Thus, the partners are free to decide that some of them will be getting some salary in addition to the profits. They may also decide about the proportion in which they will be sharing the profits and losses. They may also vary the contract whenever they like by their mutual consent.

Sub-sec. (2) gives the liaberty to the partners to make a contract that a partner shall not carry on any business other than that of the firm while he is a partner. Although according to sec. 27 of the Indian Contract Act agreement in restraint of trade is void, but such an agreement entered into between the partners as stated above will be valid.

12. The conduct of the business.—Subject to contract between the partners —

(a) every partner has a right to take part in the conduct of the business ;

(b) every partner is bound to attend diligently to his duties in the conduct of the business ;

(c) any difference arising as to ordinary matters connected with the business may be decided by a majority of the partners, and every partner shall have the right to express his opinion before the matter is decided, but no change may be made in the nature of the business without the consent of all the partners ; and

(d) every partner has a right to have access to and to inspect and copy any of the books of the firm.

Comments

This section mentions the following rules relating to the conduct of the business of the firm. These rules, being subject to agreement between the partners, are applicable unless they are varied or negatived by an agreement between the partners.

Sub-sec. (a)—Right to take part in the conduct of the business

Since the partnership business belongs to all the partners it has been provided that every partner has a right to take part in the conduct of the business. The partners are free to provide in their agreement that a partner may not take part in the conduct of the business. If a partner is wrongfully prevented from taking part in the conduct of the business he can seek the help of the court in exercising his right. In case the agreement permits only some of the partners to manage the business and not others, only

those so entitled will be eligible to conduct the business.

Sub-sec. (b)—Duty to be diligent

Every partner is supposed to attend to his duties diligently. If a partner is negligent in the performance of his duties this may cause loss not to that partner alone but to the whole firm. It has, therefore, been provided in sec. 13 (f) that if the firm suffers any loss by the wilful neglect of a partner he shall indemnify the firm for the same. Taking part in the conduct of the business of the firm being the duty of a partner, it has been provided in sec. 13 (a) that a partner is not entitled to receive remuneration for taking part in the conduct of the business. This is subject to contract between the partners and therefore, if the partners so desire they may decide about the remuneration to be paid to a partner.

Sub-sec. (c)—Right to express opinion

When there is difference of opinion between the partners majority of the partners cannot ignore the minority and take decisions without consulting them. The difference of opinion may be either (i) as to ordinary matters connected with the business, or (ii) matters of fundamental importance.

Clause (c) provides that any differences arising as to ordinary matters connected with the business may be decided by a majority of the partners. But before the matter is decided every partner must be provided with an opportunity to express his opinion. In this connection Lord Eldon observed,[5] "I call that the act of all, which is the act of the majority, provided all are consulted, and the majority are acting *bona fide*, meeting, not for purpose of negativing, what any one have to offer, but for the purpose of negativing, what, when they met together, they may, after due consideration think proper to negative: For a majority of the partners to say,—We do not care what one partner may say, we, being the majority, will do what we please,—is, I apprehend, what this Court will not allow." The power of the majority has to be exercised in good faith. If the majority of the partners decide to expel a partner without sufficient cause, the expulsion would be set aside.[6]

When the matter is not an ordinary or a routine matter but is of fundamental importance consent of all the partners is needed. Admission of a new partner to the firm or a change in the nature of the business are the matters of this nature. This provision being subject to contract between the partner, they may decide that in all matter it is the decision of majority which will prevail.

5. Const v. Harris (1824) T. & R. 496, at p. 525.
6. Blisset v. Daniel (1853) 10 Hare. 93: 90 R. R. 454: 68 E. R. 1022.

Sub-sec. (d)—Right of access to books

A partner is entitled to have access to the book of the firm. He is entitled to inspect and copy them. This right is available to every partner, whether active or dormant. This right could be exercised either personally or through a duly authorised agent.

13. Mutual rights and liabilities.—Subject to contract between the partners—

(a) a partner is not entitled to receive remuneration for taking part in the conduct of the business ;

(b) the partners are entitled to share equally in the profits earned, and shall contribute equally to the losses sustained by the firm ;

(c) where a partner is entitled to interest on the capital subscribed by him such interest shall be payable only out of profits ;

(d) a partner making for the purposes of the business, any payment or advance beyond the amount of capital he has agreed to subscribe, is entitled to interest thereon at the rate of six precent per annum ;

(e) the firm shall indemnify a partner in respect of payments made and liabilities incurred by him—

(i) in the ordinary and proper conduct of the business, and

(ii) in doing such act, in an emergency, for the purpose of protecting the firm from loss, as would be done by a person of ordinary prudence, in his own case, under similar circumstances ; and

(f) a partner shall indemnify the firm for any loss caused to it by his wilful neglect in the conduct of the business of the firm.

Comments

This section deals with the mutual rights, duties and obligations of the partners which are subject to contract between the partners. If the contract between the partners does not provide anything on these matters then the provisions of this section will be applicable.

Sus-sec. (a)—Right to remuneration

Every partner is bound to attend diligently to his duties in the partnership business[7] but he is not entitled to receive any remuneration for taking part in the conduct of the business. This

7. Sec. 12 (b).

being subject to contract between the partners, it may be agreed between them, that some of them will be receiving some salary or otherwise extra remuneration.

Sub-sec. (b)—Right to profits

Every partner has a right to share the profits. Generally the partners provide in their agreement as to what will be the proportion in which they will share the profits. For example, in a firm of three partners, it may be agreed that the profit sharing proportion will be 1/2 : 1/4 : 1/4. In the absence of any such agreement the partners are to share the profits equally and also to contribute equally to the losses sustained by the firm and not in the proportion in which various partners contribute capital. If any partner alleges that their shares are unequal he has to prove an agreement to that effect.

Sub-sec. (c)—Right of interest on capital

Generally a partner has no right of interest on capital subscribed by him. The partners can, however, decide that interest on capital is to be given. In such a case, unless otherwise agreed, the rule is that such interest shall be payable only out of profits. That means no interest on capital will be payable unless the firm makes profits.

Sub-sec. (d)—Right of interest on advances

Sometimes a partner may make payment or give advance to the firm over and above the capital subscribed by him. For such an advance he would get either such interest as may be agreed upon, or if there is no agreement to that effect then interest at the rate of six per cent per annum.

Sub-sec. (e)—Right to indemnity

A partner is entitled to claim indemnity from the firm in respect of payments made or liabilities incurred by him either in the ordinary and proper conduct of the business of the firm, or in doing such acts in an emergency, for the purpose of protecting the firm from loss. In order to claim indemnity for expenses and liabilities incurred during emergency it is necessary that the partner concerned must have acted in the same way as a person of ordinary prudence under similar circumstances would have acted in his own case.

Sub-sec. (f)—Liability for wilful neglect

It has already been noted that every partner is bound to attend diligently to his duties in the conduct of the business of the firm. If there is wilful neglect on the part of the partner in the performance of his duties and the firm suffers loss the partner concerned shall indemnify the firm for the loss thus caused. The partners are, however, free to make a contract that they will not

be liable for the wilful neglect because this provision is subject to the contract between the partners. The expression "wilful neglect" means an act done intentionally and deliberately rather than by inadvertence or an accident.[8] An act done in good aith and *bona fide* cannot be termed a wilful neglect. In *Cragg v. Ford*,[9] a partner who was made incharge for winding up the business of the firm made some delay in disposing of some bales of cotton, ignoring the suggestion of a fellow partner. The prices of cotton fell considerably and loss was caused due to the delayed sale. It was held that the defendant was not liable for the loss as there was no wilful neglect on the part of the partner concerned because he was acting *bona fide* and did not anticipate the sudden fall in the prices.

14. The property of the firm.—Subject to contract between the partners, the property of the firm includes all property and rights and interest in property originally brought into the stock of the firm, or acquired by purchase or otherwise, by or for the firm, or for the purpose and in the course of the business of the firm, and includes also the goodwill of the business.

Unless the contrary intention appears, property and rights and interests in property acquired with money belonging the firm are deemed to have been acquired for the firm.

Comments

According to sec. 15 the property of the firm is to be used by the partners exclusively for the purposes of the firm's business rather than the private and personal use of a partner. Moreover on the dissolution of a firm the property of the firm is to be applied in the payment of the debts and liabilities of the firm.[10] The partners can by an agreement decide as to what will constitute the property of the firm. Unless otherwise agreed the property of the firm will consist of what has been explained in this section.

Property of the firm not only includes what is originally brought into the stock of the firm but also whatever is subsequently acquired, by purchase or otherwise. Partners may bring in immovable property also into the common stock and that becomes the property of the firm. Even if the property contributed by one partner be an immovable property, no document, registered or otherwise, is required for transferring the property to partnership.[11]

Property of the firm also includes goodwill. It is an advantage acquired in the course of business.[12] It is acquired

8. Tamboli v. G. I. P. Rly. (1928) 52 Bom. 169 (P. C.); Govind v. Rangnath, (1930) 32 Bom. L. R. 292.
9. (1842) 1 Y. & C. Ch. Cas. 289.
10. Sec. 46.
11. Firm Ram Sahay v. Bishwanath, A. I. R. 1963 Pat. 221, at p. 223.
12. See Trego v. Hunt, (1896) A. C. 7.

by a business, beyond the mere value of the capital, stock, fund and property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers. It is an advantage which a business acquires by its reputation. A newly established business may not be able to attract many customers but when this business gets established and earns goodwill it may be able to attract more customers giving it an obvious advantage of making more profits. Goodwill being the property of the firm it may be sold either separately or along with other property of the firm.[13]

Property purchased with the partnership money is deemed to be the property of the firm. If a partner purchases some property with partnership money in his own name, it is deemed to be the partnership property being held by the partner on behalf of the firm. Thus, land purchased with the partnership money but in the name of a partner,[14] or shares purchashed by a partner with the firm's money in a partner's name,[15] or insurance policies taken on the lives of the partners the premium for which is paid by the firm, are deemed to be the property of the firm.[16]

15. Application of the property of the firm.—Subject to contract between the partners, the property of the firm shall be held and used by the partners exclusively for the purposes of the business.

Comments

The property of the firm belongs jointly to all the partners and no one can use the same for his personal advantage. Although every partner has an interest in the property but no one can deal with any specific item of property as his own. In *Addanki Narayanappa* v. *Bhakara Krishnappa*, the Supreme Court explained the nature of the rights of the partners in the following words[17]:

"...whatever may be the character of the property which is brought in by the partners when the partnership is formed or which may be acquired in the course of the business of the partnership it becomes the property of the firm and what a partner is entitled to is his share of profits, if any, accruing to the partnership from the realisation of this property, and up on dissolution of the partnership to a share in the money representing the value of the property. No doubt, since a firm has no legal existence, the partnership property will vest in all the partners and in that sense every partner has an interest in the property of the partnership. During the subsistence of the partnership, however, no partner can deal with any portion of the property as his own. Nor can he

13. Sec. 55 (1).
14. Forster v. Hale, 5 Ves 308.
15. Ex p. Connell, 3 Deac. 201 ; Ex. p. Hinds, (1849) 3 De G. & S. 163.
16. In re Adarji, A. I. R. 1929 Bom. 67.
17. A. I. R. 1966 S. C. 1300, at p. 1303.

assign his interest in a specific item of the partnership property to anyone. His right is to obtain such profits, if any, as fall to his share from time to time and upon the dissolution of the firm to a share in the assets of the firm which remain after satisfying the liabilities."

The property of the firm has got to be used exclusively for the purpose of the business of the firm. If any partner derives any profit or personal advantage by the use of the property of the firm he has to account for that profit and pay the same to the firm.[18] This rule is subject to contract between the partners.

16. Personal profits earned by partners.—Subject to contract between the partners—

(a) if a partner derives any profit for himself from any transaction of the firm, or from the use of the property or business connection of the firm or the firm name, he shall account for that profit and pay it to the firm ;

(b) if a partner carries on any business of the same nature as and competing with that of the firm, he shall account for and pay to the firm all profits made by him in that business.

Comments

Sub-sec. (a)—Personal profits earned by a partner

The partnership business is the joint business of all the partners and, therefore, duty of a partner is to act to the greatest common advantage rather than acting for personal profit at the cost of the firm. A partner is the agent of the firm for the purpose of the business of the firm. According to the rules of the law of agency no agent can deal on his own account in the business of agency without the consent of his principal.[19] If an agent, without the knowledge of his principal, deals in the business of agency on his own account instead of on account of his principal, the principal is entitled to claim from the agent any benefit which may have resulted to him from the transaction.[20] This sub-sec. makes every partner accountable to the firm for any personal profit made by him :

(i) from any transaction of the firm,

(ii) from the use of the property or business connection of the firm, or,

(iii) from the use of the firm name.

18. Sec. 16 (a).
19. Sec. 215, Indian Contract Act
20. Sec. 216, Indian Contract Act.

In *Bentley* v. *Craven*[21], one of the partners in a firm of sugar refiners, who was considered expert in the job, was entrusted with the duty of purchasing sugar for the firm for being refined. He himself was a wholesale dealer in sugar. He supplied his own sugar, which he had purchased at a lower price, to the firm at the prevailing market rates and thereby made considerable profit. He did not let his co-partners know that he was selling his own sugar to the firm and thereby making profit out of this transaction of the firm. It was held that he was bound to account to the firm for the profit thus made by him.

Similarly, if a partner, without the knowledge of the other co-partners, directly or indirectly, himself purchases the property of the firm and thereby gains some benefit, he has to account for that benefit to the firm. In *Gordon* v. *Holland*[22], a partner sold the land belonging to the firm to a *bona fide* purchaser and then re-purchased that land himself, it was held that all the benefit made by this partner on re-purchase of the land had to be given to the firm.

Sub sec. (b)—Profits earned in competing business.

A partner is supposed to devote himself solely to the business of the firm. He should not carry on a competing business. If a partner carries on any business of the same nature as and competing with that of the firm, he shall account for and pay to the firm all profits made in the competing business.

It has already been observed that the partners can lawfully make a contract that a partner shall not carry on any business other than that of the firm while he is a partner.[23] Such a contract protects the interests of the partners in partnership and has been declared to be valid inspite of the rule contained in sec. 27, Indian Contract Act, which declares an agreement in restraint of trade as void. If such an agreement has been entered into then the question of any partner carrying on any other business, competing or non-competing, does not arise. Injunction can be obtained against a partner who after making such a contract tries to carry on some business other than that of the firm. However, even if there is no such agreement between the partners, it is expected that a partner shall not carry on a competing business, otherwise he will have to account for the profits of that business to the firm. If the business carried on by a partner is not of the same nature and is not in competition with the firm the partner concerned may retain the profits of that business to himself. The above-stated rule is subject to contract between the partners and, therefore, it is possible that a partner may be permitted by a contract to carry on competing business and also to retain the profits of that business with himself.

21. (1853) 13 Beav. 75 : 104 R. R. 373.
22. (1913) 108 L. T. Rep. 385.
23. Sec. 11 (2).

17. Rights and duties of partners after a change in the firm, —Subject to contract between the partners – (a) where a change occurs in the constitution of a firm, the mutual rights and duties of the partners in the reconstituted firm remain the same as they were imme diately before the change, as far as may be :

(b) **after the expiry of the term of firm.**—where a firm constituted for a fixed term continues to carry on business after the expiry of that term, the mutual rights and duties of the partners remain the same as they were before the expiry, so far as they may be consistent with the incidents of partnership at will ; and

(c) **where additional undertakings are carried out.**—where a firm constituted to carry out one or more adventures or undertakings carries out other adventures or undertakings, the mutual rights and duties of the partners in respect of the other adventures or undertakings are the same as those in respect of the original adventures or undertakings.

Comments

This section contemplates three kinds of changes in a partnership firm :

1. **Change in the constitution of the firm.**—A change in the constitution of the firm occurs either when a new partner is admitted or a partner ceases to be a partner by retirement, expulsion, insolvency or death.

2. **Business continued after the expiry of the term.**—Partners may have originally agreed to carry on the business only for a fixed term, e. g., they become partners for a term of 5 years. It is possible that inspite of the completion of the term of 5 years partners do not close down the business, but continue to run the same.

3. **Carrying out additional undertakings.** - A firm may have been constituted to carry out one or more adventures or undertaking but subsequently the partners may decide to carry out so one more adventures or undertakings.

In all such cases the question arises that what will be position of mutual rights and duties of the parties after the changes mentioned above take place. Inspite of these changes the mutual rights and duties of the parters continue to be the same as they were existing earlier. This rule is, however, subject to contract between the partners. The partners may, by a contract vary their rights and duties when one or the other of the changes stated above take place.

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CHAPTER IV

RELATIONS OF PARTNERS TO THIRD PARTIES

Introduction

Every partner is an agent of the firm for the purpose of the business of the firm. The relation between the partners is based upon their mutual agency and therefore an act of a partner done on behalf of the firm binds all the partners of the firm towards the third party. A question may arise as to in what way and to what extent for the act of one partner others can be made liable towards the third party. The rules regarding the same are contained in this Chapter.

Since every partner has the capacity as an agent to bind the firm the principles of the law of agency are applicable for the purpose of the liability of the partners towards third parties. A partner as an agent can bind the firm in the following circumstances :—

(1) When a partner has actual or express authority to do an act.

(2) When a partner has implied authority to do an act on behalf of the firm.

(3) When a partner has an authority in emergency to act on behalf of the firm.

(4) When the act although not within the authority of a partner is subsequently ratified by the firm.

(1) Express authority of a partner

Authority may be expressly conferred upon a partner to do certain acts on behalf of the firm. The firm is bound for any such act done by a partner for which the authority was conferred upon him.

(2) Implied authority of a partner

It may not always be possible to expressly mention every act which can be done by a partner. For certain matters it may be implied that the partner has a power to act on behalf of the firm. An authority which can be inferred from the circumstances of the case is known as the "implied", "apparent", "ordinary" or "ostensible" authority. According to Sec. 19 (1), the Act of a partner which is done to carry on, in the usual way, business of the kind carried on by the firm, binds the firm. Such an authority to bind the firm is known as his implied authority. What authority is implied, therefore, depends on the nature of the business carried

on by the firm. If the business is of a general commercial nature, a partner has an implied authority to buy and sell the goods, borrow money, contract debts, make payments or sign a negotiable instrument. Similarly, it is within the implied authority of a partner in a firm of bankers to accept deposits, grant loans, draw, accept or endorse a negotiable instrument. An authority to do all that may not be there with a partner of a firm of tailors and drapers. His authority would depend upon the nature of that particular business. Sec. 19 (2) mentions the following acts as being not covered within the implied authority of a partner :—

(i) To submit a dispute relating to the business of the firm to arbitration.

(ii) To open a banking account on behalf of the firm in his own name.

(iii) To compromise or relinquish any claim.

(iv) To withdraw a suit or proceedings filed on behalf of the firm.

(v) To admit any liability in a suit or proceeding against the firm.

(vi) To acquire immovable property on behalf of the firm.

(vii) To transfer immovable property belonging to the firm.

(viii) To enter into partnership on behalf of the firm.

In order to bind the firm by an act falling within the implied authority of a partner, sec. 22 further requires that such act must be done in the firm name or in a manner which shows that there is an intention to bind the firm. For example, if taking loan is within the implied authority of a partner, the firm would be bound if the loan is taken in the name of the firm. If a partner takes loan in his personal name, the firm cannot be bound for the same.

Extension and restriction of implied authority

The implied authority of a partner may be extended or restricted. Extending implied authority means expressly conferring power upon a partner to do certain acts which the implied authority does not warrant. The firm would obviously be liable for the same.

In case the implied authority of a partner is restricted the firm can still be made liable towards third party for an act of a partner which falls within the implied authority. In the following exceptional cases, however, the third party is bound by the restriction :—

(i) When the third party while dealing with the firm has the knowledge of the restriction ; and

(ii) When the third party does not know or believe that partner to be a partner.

For example, it is within the implied authority of a partner to borrow up to Rs. 1000/- but by an agreement this power is curtailed to Rs. 200/- only. If the third party does not know of the restriction and gives a loan of Rs. 1,000/- to a partner, he can make the firm liable for the same.

(3) Authority in Emergency

According to Sec. 21 a partner has an authority, in an emergency, to do all such acts for the purpose of protecting the firm from loss as would be done by a person of ordinary prudence, in his own case, acting under similar cirmumstances, and such act binds the firm. In emergency to protect the property of the firm the partner has an authority to do even such acts for which he does not have either the express authority or the implied authority.

(4) Liability by Ratification

When a partner does an act without any authority but on behalf of the firm, the firm if it so likes, may approve or ratify such an act. After ratification the firm becomes bound by that act as if the partner had been authorised to do the same.

Effect of admission by the partner

An admission or representation made by a partner in the ordinary course of business is an evidence against the firm. In case third party wants to make use of such admission or representation it can do so. The other partners, however, are free to give evidence and disprove such admissions or representations.

Effect of notice to acting partners

A notice to an agent is deemed to be a notice to the principal. Sec. 24 of the Act embodies the same rule and states that a notice to partner who habitually acts in the business of the firm of any matter relating to the affairs of the firm operated as a notice to the firm. There is one exception to this rule. If some fraud has been committed on the firm by or with the consent of a particular partner, notice to such a partner regarding that matter is not deemed to be a notice to the firm. Therefore, if a partner of a firm of carriers in violation of a rule of the firm, agrees to carry a parcel free of charge for one of his friends, the firm cannot be deemed to be having a knowledge of the carriage of such a parcel, and as such cannot be made liable towards the third party if the parcel is lost (*Bingold* v. *Waterhouse*).

Nature of liability of partners

According to Sec. 25 every partner is liable, jointly with all

the other partners and also severally, for all acts of the firm done while he is a partner. The liability of every partner, therefore, is joint and several. The liability is also unlimited. Such a liability is of every partner whether he is active or dormant.

The liability of the firm for the act of a partner not only means liability for the contract or other lawful acts of a partner but the liability is also for wrongful acts as well. If a partner commits a tort or fraud against a third party while acting on behalf of the firm, according to Sec. 26, the firm is liable therefor to the same extent as the guilty partner. In *Hamlyn* v. *John Houston & Co.* one of the partners induced the clerk of a rival business man to divulge the secrets of the business. This amounted to the tort of inducing breach of contract and the other partner of the firm who was not aware of this act was also held liable.

Similarly, if a partner receives some money or property on behalf of the firm and misapplies the same, the firm would be liable towards third party. In the same way if some money of property belonging to a third party has been received by the firm and then one of the partners misapplies the same, the firm would be liable for that also. (Sec. 27).

Doctrine of Holding Out

Generally, only a person who is a partner can be made liable as a partner towards a third part. Sometimes a person who is not a partner nor he may be associated in the business nor sharing the profits but still may be deemed to be a partner or held out to be a partner for the purpose of liability towards third party. Sec. 28 deals with such liability.

In order to make a person liable under the doctrine of holding out the following essentials are needed :—

(i) That such a person although he is not a partner must have represented himself to be a partner or knowingly permitted a representation to be made that he is a partner in the firm ;

(ii) The person who seeks to make such a person liable must have acted on the faith of such representation ; and

(iii) Relying on the representation he must have given credit to the firm.

The basis of the doctrine of holding out is the application of the law of estoppel. One who makes a representation, on the basis of which another person acts to his detriment, is not allowed to deny that representation. For example, if the partnership consists only of A and B but another person C, who is not a partner, makes a representation to X that he is also a partner. X gives credit to the firm on the basis of this representation made

by C. X can make C liable under the doctrine of holding out. If C himself does not make representation but knowingly permits another person, for example B, to make representation that C is a partner in the firm, C would be liable in this case also. If, however, C does not know that B is making any such representation he cannot be made liable on the basis of the doctrine of holding out (*Munton* v. *Rutherford*).

The liability for the doctrine of holding out as has been mentioned above, is only towards such a person who has relied on the representation. If X relies on the representation that C is a partner, he can make C liable. But another person, for example, 'Y' who does not know such a representation, cannot take advantage of the doctrine of holding out to make C liable.

The doctrine of holding out is applicable only if the person relying on the representation has given credit to the firm. If the basis of the action is the tort committed by one of the partners, a person who is not a partner cannot be made liable on the basis of holding out (*Smith* v. *Bailey*).

The principle of holding out has been made applicable to a parter who retires from a firm or who is expelled but the public notice of retirement of expulsion of the partner has not been given. However, where after partner's death the business is continued in the old firm name, the continued use of that name or of the deceased partner's name as a part thereof shall not of itself make his legal representative or his estate liable for any act of the firm done after his death. Public notice is needed on the retirement as well as expulsion of a partner so that those who had the impression that a particular person is a partner now come to know that he has ceased to be a partner. No public notice is needed in case of death or insolvency of a partner.

Rights of transfree of a partner's interest

A partner is not entitled to transfer the whole of his interest to an outsider so as to replace somebody else in his place as partner. It is, however, possible that a partner may transfer his interest in the firm to a third party. The following is the position of the third party in whose favour the interest has been transferred (Sec. 29) :—

(i) So long as the firm continues its business such third party does not have a right to interfere in the conduct of the business nor can he require accounts, nor inspect books of the firm. Such a transferee is only entitled to receive the share of profits of the transferring partner. Such a transferee shall have to accept the account of profits agreed to by the partners.

(ii) If the firm is dissolved or the partner who had transferred his share ceases to be a partner then the final settlement of accounts of the transferring partner obviously has to be there. At

that time the transferee of the share is entitled, as against the remaining partners, to receive the share of the assets of the firm to which the transferring partner is entitled, and, for the purpose of ascertaining that share he is also entitled to have an account as from the date of the dissolution.

Position of a minor in partnership

A minor is incompetent to contract and agreement made by him is void. For creating a partnership a contract is needed and therefore all the partners must be competent to contract. A minor, therefore, cannot be a partner in a firm. Sec. 30 permits a minor to be admitted to the benefits of partnership. He can be admitted to the benefits of partnership with the consent of all the partners. It is necessary that a firm must be already in existence before a minor can be admitted to the benefits of the same.

Such a minor has a right to such share of the property and the profits as may be agreed upon. He may have access to and inspect and copying any of the aceounts of the firm. His right is limited only as regards the books of the accounts of the firm, unlike other partners he cannot have access to the other books. So long as he continues being associated, he cannot bring an action against the other partners in a court of law for an account or payment of his share of the property or profit of the firm but when he severes his connection he can file a suit for the same.

Since a minor is incompetent to contract, he does not incur any personal liability for any act of the firm. Only his share can be made liable.

Minor's position on attaining majority

When a person who was admitted as a minor to the benefits of partnership attains the age of majority he has to exercise an option, within six months of his attaining majority or of his obtaining knowledge that he had been admitted to the benefits of partnership, through a public notice whether he has elected to become a partner or he has elected to leave the firm. In case he fails to give any such notice then on the expiry of the said period of six months, he shall automatically become a partner of the firm.

In case he becomes a partner, his position will be as under :—

His rights and liabilities continue to be that of a minor upto the date on which he becomes a partner. So far as liability for the acts of the firm towards the third parties is concerned, he becomes personally liable to the third parties for all acts of the firm done since he was admitted to the benefits of partnership. The reason for such a liability is that he has already enjoyed the benefits of such acts of the firm since the date of his admission

to the benefits of partnership but no personal action could be brought against him so long as he was a minor and was not a partner. His share in the property and profits of the firm shall be the same to which he was entitled as a minor.

In case he elects not to become a partner, his rights and liabilities continue to be the same as that of a minor upto the date on which he gives a public notice. Since he severs his connection from the firm by a public notice, his share shall not be liable for any acts of the firm done after the date of the notice.

If a minor after attaining the age of majority represents or knowingly premits himself to be represented that he has become a partner in the firm, he can be made liable towards the third parties on the basis of the doctrine of holding out. This is irrespective of the fact that actually he may have elected not to become a partner.

18. Partner to be agent of the firm.— Subject to the provisions of this Act, a partner is the agent of the firm for the purposes of the business of the firm.

Comments

Mutual agency between the partners is one of the essentials needed to create partnership. From the point of view of the third parties a partner is an agent of the firm of the purpose of the business of the firm. Even if the act of the firm is done by only one of the partners on behalf of the firm, the third party can make the whole firm liable. Law of partnership is generally stated as a branch of the law of principal and agent. This Chapter incorporates various rules of the law of agency as applicable to partnerships.

According to Mr. Justice Story[1] : "Every partner is an agent of the partnership, and his rights, powers, duties and obligations, are in many respects governed by the same rules and principles as those of an agent ; a partner virtually embraces the character of both a principal and agent."

It has been observed by Lord Wensleydale[2] : "A man who allows another to carry on trade, whether in his own name or not, to buy and sell, and to pay over all the profits to him, is undoubtedly by the principal, and the person so employed is the agent, and the principal is liable for the agent's contracts in the course of his employment. So if two or more agree that they should carry on a trade and share the profits of it, each is a principal, and each is an agent for the other, and each is bound by the other's contract in carrying on the trade, as much as a single principal would be by the act of an agent, who was to give the whole of the profits to his employe."

1. Story on partnership, Section 1.
2. Cox v. Hickman (1860) 8 H. L. C. 268.

A partner is an agent of the firm. This agency is only for the purpose of the business of the firm. He can enter into contracts, purchase and sell goods, borrow money and do similar acts in so far as they are necessary for the carrying on the business of the firm and firm will be bound by every such act. If he, on the other hand, does an act unconnected with the business of the firm, e. g., purchases materials for the construction of his own building or borrows money for his daughter's marriage, the firm will not be bound by that as he is not firm's agent for that purpose.

19. Implied authority of partner as agent of the firm.—(1) Subject to the provisions of section 22, the act of a partner which is done to carry on, in the usual way, business of the kind carried on by the firm, binds the firm.

The authority of a partner to bind the firm conferred by this section is called his "implied authority."

(2) In the absence of any usage or custom of trade to the contrary, the implied authority of a partner does not empower him to—

(a) submit a dispute relating to the business of the firm to arbitration,

(b) open a banking account on behalf of the firm in his own name,

(c) compromise or relinquish any claim or portion of a claim by the firm,

(d) withdraw a suit or proceeding filed on behalf of the firm,

(e) admit any liability in a suit or proceeding against the firm,

(f) acquire immovable property on behalf of the firm,

(g) transfer immovable property belonging to the firm, or

(h) enter into partnership on behalf of the firm.

Comments

We have already noted that a partner is an agent of the firm for the purpose of the business of the firm. A partner can bind other partners by doing an act either for what he has been expressly authorised or for such acts for which he is deemed to be having an authority. According to sub-sec. (1) an act of a partner which is done to carry on, in the usual way, business of the kind carried on by the firm, binds the firm. Such an authority to bind the firm is known as implied authority. It may not be possible to expressly mention what can exactly be done on behalf of the firm. Depending on the nature of the business, a partner has certain implied authority. Implied authority of a partner depends upon

the nature of the business of the firm. For an act to be covered within the implied authority it is necessary that—

(i) the act should be done in relation to the partnership business ;

(ii) the act should be done for carrying on the business of the firm in the usual way ; and

(iii) the act must be done on behalf of the firm.

When a partner acts within such an "implied", "apparent", "ordinary" or "ostensible" authority, the firm will be bound to the third parties even though for such an act no specific actual authority has been conferred upon the partner. The reason for making the firm liable towards the third parties for acts which fall within the implied authority of a partner is that the third party cannot always know what exact authority has been conferred on each partner; but the third party can always rely on the assumption that since a partner is an agent of the firm, he may be having an authority to do all what is necessary to carry on the business of the firm. Nature of the business, therefore, determines the scope of the implied authority of a partner. If it is a firm of sugar merchants, sale and purchase of sugar is within the implied authority of any of its partners. Similarly, a partner in a firm of bankers may accept deposits, grant loans, draw, endorse or accept a negotiable instrument and thereby bind the firm. But if a partner in a firm of grain merchants does all that, that will be outside the authority of the partner for which the firm cannot be bound. In *Mercantile Credit Com any Limited* v. *Garrod*[3], a firm consisting of two partners Parkin and Garrod was carrying on garrage business which was concerned with letting lock-up carriages and repairing cars. Parkin was active partner whereas Garrod was a sleeping partner. Sale of second hand cars could be impliedly considered to be the business of the firm. Parkin, without the authority of his co-partner Garrod, sold a car to the Mercantile Credit Company Ltd. over which he had no title and received a sum of £ 700 for the same. On knowing that the seller had no title to the car, the company brought an action against Garrod to claim £ 700 from him. It was held the sale of the car to the company by one of the partners was an act for carrying on, in the usual way, the business of the kind carried on by the firm and, therefore, for such an act, which was within his implied authority, the other partner of the firm could be made liable.

When a partner has implied authority to do something the firm will be bound by such an act even though the partner may be acting in fraud of his co-partners. This is on the basis of the well-established principle laid down in *Llyod* v. *Grace, Smith & Co.*[4] that the principal is liable for the act of the agent if the act

3. (1962) 3 All E. R. 1103.
4. (1912) A. C. 716.

is within the scope of the agent's authority even though the agent may be acting for his personal gain and the principal may not be knowing about the transaction. Similarly, in *Hamlyn* v. *John Houston & Co.*[5] one of the partners committed a tort of inducing breach of contract by bribing the clerk of a rival business man in order to know the secrets of the rival business man. The other partner was not aware of this tort. It was held that it was within the authority of a partner to lawfully do what had been done unlawfully. Therefore, the other partner was also held liable for the tort.

It is also necessary that the act done by a partner must be done to carry on, in the usual way, business of the kind carried on by the firm. What is usual for one kind of business may not be so for another kind of business. In a trading firm every partner will have an implied authority to borrow money for the purpose of the business and thus make the other partners also liable for the amount so borrowed.[6] If the business is of a general commercial nature the partner may pledge or sell partnership property, he may buy goods, borrow money, contract debts, and make payments on behalf of the firm, he may draw, make, sign, endorse, accept or transfer a negotiable instrument on behalf of the firm.[7] In a non trading business, for example, that of an auctioneer, a partner cannot borrow money as it has been held in *Wheatly* v. *Smiths*[8] that an auctioneer is not a trader because his bussiness was not for the buying or selling of goods. In *Higgins* v. *Beauchamp*,[9] Milles an active partner of cinema proprietors borrowed money from Higgins. Higgins brought an action against the sleeping partner Beauchamp. It was held that business of the firm was not a trading one and therefore the firm was not bound by the loan taken by one partner in this case.

Sec. 19 (1) is subject to the provisions of Sec. 22 which further requires that in order to bind the firm the act of the partner must be done on behalf of the firm in a manner which shows that there is an intention to bind the firm. If an act which would ordinarily be within the implied authority of a partner is done by a partner in his personal name and not on behalf of the firm, the firm will not be liable. For example, a partner of a trading firm borrows money without indicating that he is acting on behalf of the firm, the loan is deemed to have been taken by the partner for himself personally, for which the firm will not be liable.

Restrictions on implied authority

Sub-sec. (2) mentions the list of acts regarding which a partner does not have an implied authority unless there is a usage or

5. (1903) 1 K. B. 81.
6. Perumal v. A. Muhammad, A. I. R. 1958 Ker. 25.
7. Bank of Astralasia v. Breillate (1847) 6 Moo. P. C. 152
8. (1937) 2 K. B. 684.
9. (1914) 3 K. B. 1892 ; (1914-15) All E. R. 937.

custom of trade to the contrary. For example, a partner does not have any implied authority to acquire immovable property on behalf of the firm or to transfer immovable property belonging to the firm. Such an act can be done by a partner only if he has been expressly authorised by the other co-partners to do that act on behalf of the firm. If a partner has done an act which does not fall within his authority the same could be ratified by the other partners and upon ratification of such an act the firm become bound by the same.

20. Extension and restriction of partner's implied authority. —The partners in a firm may, by contract between the partners, extend or restrict the implied authority of any partner.

Notwithstanding any such restriction, any act done by a partner on behalf of the firm which falls within his implied authority binds the firm, unless the person with whom he is dealing knows of the restriction or does not know or believe that partner to be a partner.

Comments

This section enables the partners to extend or restrict the implied authority of a partner. A partner may be expressly authorised to do something for which he does not have implied authority. The firm will be bound by such an act of the partner.

When a restriction has been imposed on the implied authority of a partner, such a restriction is not binding on the third party unless the third party has the knowledge of the restriction. There is a difference between the statutory restrictions which have been imposed by sec. 19 (2) on the implied authority of a partner and the restrictions on the implied authority which may be imposed under sec. 20 by a contract between the partner. The statutory restrictions are effective against all the third parties as they are deemed to be having the knowledge of the restrictions. The third parties, however, cannot be prsumed to be having the knowledge of the restrictions which the partners may impose by a contract between themselves, and, therfore, a third party can be bound by a restriction imposed under Sec. 20 if he had the actual knowledge of such a restriction. In *Motilal* v. *Unnao Commercial Bank*[10] a restriction was placed by a partnership deed on the authority of the partners to borrow money. One of the partners borrowed money any accepted a bill of exchange, it was held that since the third party did not know of the restriction, the firm was liable towards such third party. Similarly, in *Prembhai* v. *Brown*[11] one of the partners of a firm of carriers was authorised to draw bills on the firm to the extent of Rs. 200 each. This fact was known to a third party in whose favour the partner made two promissory notes for Rs. 100/- each. It was held that the firm

10. (1930) 32 Bom. L. R. 1571.
11. (1873) 10 Bom. H. C. Rep. 319.

could not be bound for the amount of the Notes drawn as the restriction on the implied authority was within the knowledge of the third party.

21. Partner's authority in an emergency.—A partner has authority in an emergency to do all such acts for the purpose of protecting the firm from loss as would be done by a person of ordinary prudence, in his own case, acting under similar circumstances, and such acts bind the firm.

Comments

A partner can bind the firm by doing an act on its behalf if the act falls within the express or implied authority of the partner. Apart from that this section confers an authority on a partner in emergency for doing all such acts for the purpose of protecting the firm from loss as would be done by a person of ordinary prudence, in his own case. For such an act the firm would be bound towards the third party. The authority conferred by this section is similar to the authority conferred upon an agent under section 189 of the Indian Contract Act. If a partner makes some payments or incurs liability in doing an act, in an emergency, for the purpose of protecting the firm from loss, and he has acted as a prudent man in like circumstances would have acted in his own case, the firm shall indemnify the partner for the same.

22. Mode of doing act to bind firm.—In order to bind a firm, an act or instrument done or executed by a partner or other person on behalf of the firm shall be done or executed in the firm name, or in any other manner expressing or implying an intention to bind the firm.

Comments

A firm is bound by the act of a partner which is done by him within his implied authority. In order that the firm can be bound, this section requires that the act or the instrument done or executed by a partner must be done or executed—

(i) in the name of the firm ; or

(ii) in a manner expressing or implying an intention to bind the firm.

If a partner does an act without indicating that he is acting on behalf of the firm, the act is deemed to have been done by him on his own behalf and the firm cannot be made liable for the same. If the act has been done on behalf of the firm, all the other partners become liable. Even when the names of the other partners are not mentioned they are in the position of undisclosed principal and are as such liable.[12] For such an act a dormant partner is also liable in the same way as any other partner.[13]

12. Venkatasubbiah Chetty v. G. N. Naidu, I. L. R. (1908) 31 Mad. 45.
13. Behkham v. Drake, 9 M. & W. 79.

When a partner does an act or executes an instrument in his own name only and not on behalf of the firm, and there appears to be no express or implied intention to bind the firm, the firm will not be bound by that. The third party, in such a case, is deemed to be acting only on the personal credit of the dealing partner, who alone will be liable for such a transaction. It is immaterial that the firm derives no benefit from this transaction.[14]

23. Effect of admission by partner.—An admission or representation made by a partner concerning the affairs of the firm, is evidence against the firm, if it is made in the ordinary course of business.

Comments

Partner being an agent of the firm for the purpose of the business of the firm an admission or representation made by a partner concerning the affairs of the firm is evidence against the firm. For example, admission by one partner regarding making of a contract, execution of a document, payment of money, supply of goods or financial condition of firm, will be evidence against all the other partners. It is, of course, necessary that such admission or representation must have been made in the ordinary course of business. Similarly, representations made by a partner also have the same effect.

The admissions and representations constitute an evidence against the firm provided a third party wants to make use of such admissions or representations.

An admission and representation made by a partner is simply an evidence against the firm. Evidence can be given to disprove such admissions or representations made by a partner as they do not constitute conclusive proof of the matters admitted or represented.

24. Effect of notice to acting partner.—Notice to a partner who habitually acts in the business of the firm of any matters relating to the affairs of the firm operates as notice to the firm, except in the case of a fraud on the firm committed by or with the consent of that partner.

Comments

Section 24 also embodies another general principle of the law of agency. Notice to an agent concerning the matters of agency is deemed to be a notice to the principal. Section 24 provides that notice to a partner who habitually acts in the business of the firm of any matter relating to the affairs of the firm operates as a notice to the firm.

14. See British Homes Ass. Corp Ltd. v. Paterson (1902) 2 Ch. 404; and Gree v. Downs Supply Co. (1927) 2 K. B. 28.

Such a notice binds only such partners who are there at the time when the notice was given. Therefore, if some notice had been given earlier, it will not bind a partner who is introduced as a partner after such notice. Similarly, an outgoing partner cannot ordinarily be bound by a notice relating to subsequent matters. However, if public notice of dissolution of a firm of ceasing of a partner to be a partner has not been given, the partners continue to be liable as before and notice in such cases may affect even those partners who are no more partners.

In order that notice to one partner operates as a notice to the whole firm it is necessary that the notice must have been given to a partner who habitually acts in the business of the firm. Notice to a dormant or a sleeping partner would, therefore, not be considered to be a notice to others.

Exception.—If a fraud has been committed on the firm by or with the consent of a particular partner, notice to such a partner regarding that matter is not deemed to be a notice to the firm. If in any particular matter an agent is himself party to the fraud, he cannot be presumed to be passing on such information to his principal. In such matters, therefore, notice to the agent does not serve as notice to the principal.

In *Bignold* v. *Waterhouse*[15] the defendents, a firm of carriers, according to the rules, were accountable for parcels above the value of £ 5 only if such parcels had been specially entered and paid for. One of the working partners allowed to be carried one parcel of a personal friend without any consideration and he did not bring this fact to the notice of his other co-partners. In an action for the loss of the parcel against the firm, it was held that the firm was not liable as notice to one of the partners about the carrying of the parcel was not deemed to be notice to others because the particular partner who had the knowledge of the parcel was a party to the fraud as no payment had been made for the transportation of the parcel.

25. Liability of a partner for acts of the firm.—Every partner is liable, jointly with all the other partners and also severally, for all acts of the firm done while he is a partner.

Comments

A principal is liable for the act of his agent done by him on his behalf. According to Section 18, it has been noted above, a partner is an agent of the firm for the purpose of the business of the firm. Obviously, therefore, the whole of the firm, which means all the partners of the firm, become liable for an act of the firm done by any partner.

Section 25 mentions the nature of such a liability. It says

15. 1813, 1 M. & S. 255 : 105 E. R. 95.

that every partner is jointly and severally liable for all acts of the firm done while he is a partner.

Joint and Several Liability

The liability of all the partners is joint and several even though the act of the firm may have been done by only one of them. Such liability is there for all acts of the firm. According to section 2 (a) an act of a firm means any act or omission by all the partners or by any partner or agent of the firm which gives rise to a right enforceable by or against the firm. It, therefore, means that any act or omission which creates a right enforceable is an act of the firm. It may be a contract or a wrongful act, for example, fraud, negligence, mis-application of money or any tort. All the partners are liable as much for the wrongful act of any partner as they would be liable for a contract entered into by one of them on behalf of the firm. In India the liability of the partners for contracts as well for torts is joint and several. In England, the partners are liable jointly in respect of contracts but they are liable jointly and severally in respect of torts.

The basis of the liability of partners being mutual agency as between them, the liability of the partner, therefore, arises for such acts which are done while a person is a partner. A partner, therefore, cannot be made liable for an act of the firm which may have been done before he was introduced to partnership. Similarly, there can be no liability for the acts of the firm done if a person has ceased to be a partner. This rule, of course, is subject to the provisions mentioned in sections 32 (3) and 45, according to which inspite of the retirement of a partner or the dissolution of a firm, the liability of the partners may continue as before until a public notice of retirement or dissolution of the firm is given.

The liability as mentioned in this section is for all the partners whether they are active or dormant. The principle behind the liability of the partners being mutual agency which is impliedly there between all the partners, the liability of every partner, therefore, arises for every act of the firm done while he is a partner.

The liability of all the partners is not only joint and several but is also unlimited. It is the discretion of the third party to bring an action against some or all the partners. No partner can be allowed to take the plea that between the partners themselves the agreement provides only limited liability for him or responsibility for only a part of the share of the loss. The third party may, therefore, bring an action against any one of the partners themselves, the partner paying for more than his share of the responsibility may claim contribution from the others.

26. Liability of the firm for wrongful acts of a partner.— Where, by the wrongful act or omission of a partner acting in the

ordinary course of the business of a firm, or with the authority of his partners, loss or injury is caused to any third party or any penalty is incurred, the firm is liable therefor to the same extent as the partner.

Comments

It has been noticed above that for an act of the firm every partner is liable and that includes liability for wrongful acts also. Section 26 specifically provides regarding such liability. It states that where by the wrongful act or omission of a partner loss or injury is caused to any third party, or any penalty is incurred, the firm is liable therefor to the same extent as the guilty partner. The wrongful acts may be tort, fraud, negligence or misapplication of money or mis-appropriation of property. Section 27 explains such liability separately in case of mis-application of money or property.

According to well-settled rules of Law of Tort a master is vicariously liable for the wrongs of his servant done in the course of employment. Similar rule is applicable in the case of principal and agent also. Since the relationship between the partners is that of principal and agent, the same kind of liability for partners has been incorporated in section 26. The case of *Llyods* v. *Grace, Smith & Co.*,[16] which recognized such liability for the principal, would explain the position. In that case one Mrs. Llyod, a widow, who owned two cottages called at the office of Grace, Smith & Co., a firm of solicitors. She wanted to consult this firm as she was not satisfied with the income which she was having from these two cottages. She was attended by the managing clerk of the company. The managing clerk advised her to sell the cottages and for that purpose asked her to sign two documents which were supposed to be sale deeds. The managing clerk had fraudulently prepared the two documents as gift deeds in his own name. He then diposed off the said property and misappropriated the money. The House of Lords unanimously held that Grace, Smith & Co. were liable for the fraud of their agent even though the agent had been acting for his personal gain and without the knowledge of his principal.

In *Hamlyn* v. *John Houston & Co.*[17] for the tort committed by one partner the other partner was also held liable. There, one of the two partners of the defendant's firm acting within the general scope of his authority as a partner bribed the plaintiff's clerk and induced him to make a breach of contract with his employer, that is the plaintiff, by divulging some secrets relating to his employer's business. It was held that although the wrong of inducing breach of contract had been committed by only one of the partners and the other partner had no notice of the same yet since the wrong was done in the scope of the authority of the wrongdoing partner, the other partner was also held liable.

16. 1912 A. C. 715.
17. (1903) 1 K. B, 81 : 51 W. R. 99.

In *Hurruck Chand* v. *Gobind Lal*,[18] one of the partners, who was an active partner in a firm, knowing that the goods were stolen ones, purchased and sold them without the knowledge of the other partner who was a sleeping partner. It was held that both the partners were liable for the tort of conversion to the owner of the goods.

27. Liability of firm for misapplication by partners.— Where—

(a) a partner acting within his apparent authority receives money or property from a third party and misapplies it; or

(b) a firm in the course of its business receives money or property from a third party and the money or property is misapplied by any of the partners while it is in the custody of the firm,

the firm is liable to make good the loss.

Comments

This section deals with liability for particular kind of wrongful act *i. e.*, liability for misapplication of money or property of a third party. In this section two kinds of cases of misapplication of money or property have been mentioned :—

(i) when the money or property has been received by a partner and he misapplies the same without accounting for it to the firm ; and

(ii) when the money or property has been received by the firm from third party and the same is misapplied by any of the partners.

In either case the firm is liable to make good the loss to the third party.

1. Liability for money or property received by a partner who misapplies the same :—

According to section 27 (a) when partner acting within his apparent authority receives money or property from a third party and misapplies the same, the firm is liable for that. In *Willett* v. *Chambers*,[19] one of the partners of a firm of solicitors and conveyancers received money from a client for being invested on a mortgage and mis-applied the same. The other partner who was ignorant of this fraud was also held liable along with the guilty partner.

Similarly, in *Rhodes* v. *Moules*[20] one of the partners of a firm

18. (1906) 10 Cal. W. N. 1053.
19. C. O. W. P. 814.
20. (1895) 1 Ch. 236.

of solicitors was requested by a client to obtain loan for the client on the mortgage of some property. The said partner told the client that the mortgagees wanted some additional security and thus obtained from the client some share warrants payable to bearer. He subsequently misappropriated the share warrants and absconded. The other partners had no knowledge of the deposit of the warrants and subsequent appropriation thereof. It was found that on some earlier occasions such share warrants had been received through the same partner from the same client by this firm. It was therefore, held that it was within the apparent authority of the partner to receive the share warrants, the transaction was a partnership transaction and the other partners were liable for the misappropriation of the warrants made in the case.

If the money or the property has been received by a partner not in the ordinary course of business of the firm but only in his personal capacity, the firm cannot be liable for the same. In *British Homes Corporation Ltd.* v. *Patterson*[21] one of the partners of a partnership firm obtained a cheque payable to himself and not in the name of the firm, it was held that for the mis-appropriation of such a cheque which had been received by him in his personal capacity, the other partner could not be made liable.

In *Cleather* v. *Twisden*[22], one of the partners of a firm of solicitors received some bounds payable to bearer and mis-appropriated the same. It was found that the receipt of such securities for safe custody was not a part of the business of the solicitors and therefore it was held that the other partners could not be held liable for the same. The position would have been different as was there in the case of *Rhodes* v. *Moules*[23] if the receipt of such bonds had been within the implied authority of the partner concerned.

(2) Liability for misapplication of money or property received by the firm and misapplied by a partner :

Where the firm in the course of its business receives money or property from a third party and the same is misapplied by any of the partners while it is in the custody of the firm, the firm can be made liable towards the third party to make good the loss. In *Blair* v. *Bromley*[24], a firm of solicitors consisting of two partners received some money to be invested in a mortgage. The money was deposited with the firm's bankers. Only one of the partners attended to the monetary transactions of the firm. This partner misapplied the money but continued falsely telling the client that the same had been invested. The client was paid interest regularly by the said partner who attended to the matter. The fraud was not known to the othe partner but it was held that the other part-

21. (1902) 86 L. T. 826.
22. 23, Ch. D. 340.
23. (1895) 1 Ch. 236.
24. 5 Hare 542.

ner could be made liable for the same. Similarly, in *Ex parte Biddulph*[25] one of the partners of a firm of bankers withdrew the trust money and misapplied the same. All the partners of the firm were held liable to make good the loss. In the same way in *Sadler v. Lee*[26], when one of the members of the firm of bankers misapplied the money which had been credited with the firm as sale proceeds of the stock of a customer, all the members of the firm were held liable for such misapplication.

28. Holding out.—(1) Any one who by words spoken or written or by conduct represents himself, or knowingly permits himself to be represented, to be a partner in a firm, is liable as a partner in that firm to any one who has on the faith of any such representation given credit to the firm, whether the person representing himself or represented to be a partner does or does not know that the representation has reached the person so giving credit.

(2) Where after a partner's death the business is continued in the old firm name, the continued use of that name or of the deceased partner's name as a part thereof shall not of itself make his legal representative or his estate liable for any act of the firm done after his death.

Comments

Every partner is liable for all acts of the firm done while he is a partner. Therefore, generally a person who is not partner in the firm cannot be made liable for an act of the firm. In certain cases, however, a person who is not a partner in the firm may be deemed to be a partner or held out to be a partner for the purpose of his liability towards a third party. The basis of liability of such a person is not that he was himself a partner or was sharing the profits or was taking part in the management of the business, but the basis is the application of the law of estoppel because of which he is held out to be a partner or is deemed to be partner by 'holding out'.

The doctrine of holding out is a branch of the law of estoppel. According to the law of estoppel if a person, by his representation, induces another to do some act which he would not have done otherwise, then the person making the representation is not allowed to deny what he asserted earlier.

Therefore, if a person who is not a partner, by his representation, creates an impression in the third party that he is a partner, on the basis of which the third party gives credit to the firm, the person making such a representation will be held out to be a partner. In the words of Lord Denman, C. J.[27]

25. 3 De G. & Sm. 587.
26. 6 Beav. 324.
27. Pickard v. Sears (1837) 6 A. & E. 469.

".....where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is precluded from averring against the latter a different state of things as existing at the same time....."

For example, a partnership firm consists of A, B, & C. D, who is not a partner, makes a representation to X that he is also a partner and on the faith of this representation X gives credit to the firm : In this case X can make D liable on the basis of holding out and D is estopped from denying that he is partner in the firm.

The principle was thus stated by Eyre C. J. in *Waugh* v. *Carvar* :[28]

"Now a case may be stated in which it is the clear sense of the parties to the contract that they shall not be partners, that A is to contribute neither labour nor money, and, to go still further, not to receive any profits. But if he will lend his name as a partner, he becomes against all the rest of the world a partner, not upon the ground of the real transaction between them, but upon principles of general policy, to prevent the frauds to which creditors would be liable, if they were to suppose that they lent their money upon the apparent credit of three or more persons, when, in fact, they lent it only to two of them, to whom without the others they would have lent nothing."

For the application of the doctrine of holding out section 28 (1) requires the persence of the following essentials :

1. The person sought to be made liable under the doctrine of hoiding out either has himself represented, or knowingly permitted somebody else to represent, that he is a partner in the firm.

2. The third party who wants to bring an action must have acted on the faith of the representation and given credit to the firm.

1. Representation

In order to make a person liable under the doctrine of holding out it has to be proved that either he himself made a representation or knowingly permitted such a representation to be made by someone else. In other words there has to be a representation by a person by words spoken or written or by his conduct that he is a partner in the firm. Representation in any form indicating that a person is a partner in the firm will create the liability. Fraudulent intention to mislead another person is not required. Whether the liability for holding out exists or not

28. (1793) 2 H. Bl. 235 : Also see Ex p. Watson, 19 ves 459; Ex. p. Matthews, 3 V. & B. 125 ; De Berkom v. Smith. Esp. 29.

depend on motive of the person making the representation but on the fact that a third party has given credit on the faith of that representation. When the third party has acted on the representation the section creates the liability whether the person representing himself or represented to be a partner does or does not know that the representation has reached the person so giving credit. The presence of the two essentials, i. e., the representation by one person about the fact of his being a partner and the acting by a third party on the faith of the representation are enough to create liability under the doctrine. Thus, in *Snow White Food Product Pvt. Ltd.* v. *Sohan Lal Bagla*[29] it was held that by his verbal negotiations and subsequent correspondence, Sohanlal represented as a partner of a firm of carriers and, therefore, he was a partner by holding out.

It has been noted above that the liability under the doctrine of holding out arises when a person has either made a representation that he is a partner or *knowingly permitted such a representation to be made by someone else.* If I know that I am being wrongly represented as a partner I have a duty to deny that. If knowing that fact I permit the representation to be made the law of estoppel will apply against me and I can be held out to be a partner. In case it is being represented that a person A is partner in a firm but A is not aware of such a representation, the question of A's liability under the doctrine of holding out does not arise. The position can be explained by referring to the case of *Munton* v. *Rutherford*.[30] In that case one, Beckwith published a statement in a newspaper that he and Mrs. Rutherford had formed a partnership. The statement was false and Mrs. Rutherford did not know about the same. It was held that Mrs. Rutherford was not liable as a partner by estoppel or holding out. It was observed :

".....If she had been shown the article, and assented to and credit had been given on the strength of such assent, the rule of estoppel would have applied. There being no evidence that she authorised or assented to it, there is no room for the application of the rule."

Knowingly permitting oneself to be represented does not mean mere careless in allowing oneself to be represented as a partner. In *Tower Cabinet Co.* v. *Ingram*[31], partnership consisted of Christmas and Ingram. The partnership was dissolved and thereafter the business was carried on by Christmas alone. Christmas used an old notepaper of the firm bearing the name of both Christmas and Ingram and placed an order for the purchase of some furniture from Tower Cabinet Co. Tower Cabinet Co. used Ingram to make him liable on the basis of the doctrine of holding

29. A. I. R. 1964 Cal. 209.
30. 121 Mich 418.
31. (1949) 1 All E. R. 1033.

out. It was held that merely because Ingram was negligent in not getting the old notepapers destroyed when he left the firm, it cannot be inferred that he permitted himself to be represented as a partner and therefore he was not liable. Lynskey J. observed[32] :

"Before the company can succeed in making Mr. Ingram liable.....they have to satisfy the court that Mr. Ingram, by words spoken or written or by conduct, represented himself as a partner. There is no evidence of that. Alternatively, they must prove that he knowingly suffered himself to be represented as a partner. The only evidence of Mr. Ingram's having knowingly suffered himself to be so represented is that the order was given by Mr. Christmas on notepaper which contained Mr. Ingram's name. That would amount to a representation by Mr. Christmas that Mr. Ingram was still a partner in the firm, but, on the evidence and the master's finding, that representation was made by Mr. Christmas without Mr. Ingram's knowledge and without his authority. That being the finding of fact, which is not challenged, it is impossible to say that Mr. Ingram knowingly suffered himself to be so represented. The words are "knowingly suffers"—not being negligent or careless not seeing that all the notepapers had been destroyed when he left."

2. Acting on the faith of representation and giving credit

In order to entitle a person to bring an action under the doctrine of holding out it has to be shown that he acted on the faith of the representation and gave credit to the firm. But if a person while giving credit to the firm did not know about the representation he can't take advantage of this doctrine and make such person liable as a partner.[33] The estoppel can be relied upon only by the person to whom the representation has been made, and who has acted upon the faith of it.[34] For example, D who is not actually a partner in the firm consisting of A, B & C represents to X that he is also a partner in that firm. On the faith of that representation X gives credit to the firm. X can make D liable under the doctrine of holding out. But if Y, who does not know of the representation gives credit to the firm of A, B & C, he cannot make D liable.

Torts

The liability under the doctrine of holding out arises when the person acting on the faith of representation has given credit to the firm. If the basis of the action is the tort committed by one of the partners, the doctrine of holding out does not apply in such a case.

32. Ibid., at p. 1036.
33. Tower cabinet Co. v. Ingram (1949) 2 K. B. 397 ; In Re Fraser (1892) 2. Q. B. 633; Juggilal Kamalapat v. Sew Chand Bagree A. I. R. (1960) Cal. 463.
34. In Re Fraser (1892) 2 Q. B. 633.

In *Stables* v. *Eley*,[35] a retired partner was held liable for the negligence of a cart driver of the firm because the name of the retired partner still continued to be there on the cart.

The above case has been disapproved by the Court of Appeal in *Smith* v. *Bailey*[36] as the liability arising out of tort is not covered by the doctrine.

Position of a retired Partner

When a partner retires the relation of partnership between the retiring and the other partners comes to an end. If a third party who knew of the existence of this relationship does not know that the relationship has come to an end and gives credit to the firm, he can make the retiring partner also liable. Similarly, if he gives credit to the retiring partner thinking him to be still a partner he can make the continuing partners liable. In other words from the point of view of the third parties the mutual agency which had earlier come into existence is still presumed to be continuing until public notice of retirement is given. Sec. 32 (3) provides that "Notwithstanding the retirement of a partner from, firm, he and the partners continue to be liable as partners to third parties for any act done by any of them which would have been an act of the firm if done before the retirement, until public notice is given of the retirement."

Such public notice may be given either by the retired partner or by any partner of the reconstituted firm.[37]

The reason for liability even after the retirement is that the absence of the notice of revocation of an agent's authority makes the principal liable to those who act on the supposition that the agency still continues.

Lord Blackburn referring to liability in such cases stated[38]: "I do not think that the liability is upon the ground that the authority actually continues. I think it is upon the ground that there is a duty upon the person who has given that authority, if he revokes it, to take care that notice of that revocation is given to those who might otherwise act on the supposition that it continued; and the failure to give that notice precludes him from denying that he gave the authority against those who acted upon the faith that authority continued."

No public notice is needed on the retirement of a dormant partner, *i. e.*, a partner who is not known as such to third parties, because the Partnership Act further provides that a retired partner is not liable to any third party who deals with the firm without

35. 1. C. and P. 664.
36. (1891) 2 Q. B. 403.
37. S. 32 (4).
38. Scarf v. Jardine (1882), 7 A. C. 345, 357.

knowing that he was partner.[39] The object of public notice being to remove the impression from the mind of the third parties that a certain person was a partner no public notice is needed when the third parties had no such impression.

An important point came for consideration in *Scarf* v. *Jardine*[40], where a third party was ignorant of either the retirement of a partner or the introduction of a new partner, when both the changes had taken place simultaneously. In that case a firm consisted of two partners, A and B. A retired and C joined the partnership in his place. No notice of the change was given. A customer of the old firm, who was not aware of the abovestated change, supplied goods to the reconstituted firm. To recover the price of the goods he brought an action against B and C. Having failed to recover the price from them he brought another action against A. The question before the court was, whether the third party who had supplied goods to the firm, could successfully bring action against A, B and C. It was held that when the customer is ignorant of the retirement of A as well as the introduction of C, he has an option to sue either A and B on the ground of estoppel or B and C on the basis of actual facts. Since A never held himself out as a partner alongwith B and C both, he cannot make A, B and C all of them liable. Therefore, after having elected to sue B and C he cannot bring an action against A. The position would have been different if he was aware of the introduction of C to the firm but was not aware of the retirement of A. Then he could presume that C had joined the firm which already consisted of A and B and in that situation could make all the three partners liable.

The position of an expelled partner is the same as that of a retired partner[41] and in his case also a public notice of expulsion has got to be given to avoid his liability for the acts done after the date of expulsion.

Death of a partner

On the death of a partner there is automatic dissolution of a firm unless there is a contract to the contrary between the partners.[42] When there is a contract between the partners by virtue of which the firm is not dissolved *viz.*, the remaining partners continue the business – the fact that the business of the firm is continued in the old firm name, does not of itself make the legal representatives or the estate of the deceased partner liable for an act of the firm done after his death.[43] The position of the legal representatives of a deceased partners is different from that of a retired partners, as the former will not be liable for the acts of the

39. Proviso to sec. 32 (3).
40. (1882) 7 A. C. 345.
41. See sec. 33 (2).
42. S. 42 (c).
43. S. 28 (2) : Also see Proviso to S. 45 (1).

firm done after the death of the partner even though no public notice of partner's death is given.

29. Rights of transferee of a partner's interest.—(1) A transfer by a partner of his interest in the firm, either absolute or by mortgage, or by the creation by him of a charge on such interest, does not entitle the transferee, during the continuance of the firm, to interfere in the conduct of the business, or to require accounts, or to inspect the books of the firm, but entitles the transferee only to receive the share of profits of the transferring partner, and the transferee shall accept the account of profits agreed to by the partners.

(2) If the firm is dissolved or if the transferring partner ceases to be a partner, the transferee is entitled as against the remaining partners to receive the share of the assets of the firm to which the transferring partner is entitled, and, for the purpose of ascertaining that share, to an account as from the date of the dissolution.

Comments

The relation of partners is based upon mutual confidence and trust and obviously, therefore, no person may be introduced as a partner in the firm without the consent of all the existing partners.[44] It follows that no partner can assign his share in a way which may substitute an outsider in his place. If any partner transfers the whole of his interest in the firm to a third party, the other partners may apply to the court for the dissolution of the firm.[45] It is however, possible that a partner may transfer his interest in the business in favour of a third person. Section 29 deals with the rights of the transferee of a partner's interest.

Sub-sec. (1).—During the continuance of the firm the transferee of partner's interest does not become entitled to interfere in the conduct of the business of the firm. Nor can such a transferee require accounts, nor can he inspect the books of the firm. He is bound to accept the account of profits agreed to by the partners. His only right is to receive the share of profits of the transferring partner. The reason why the transferee is not entitled to interfere in the conduct of the business is that partnership being based on mutual confidence and trust between the partners, there should be no interference by any outsider.

Sub-sec. (2).—When the firm is dissolved or the transferring partner ceases to be a partner there is obviously final settlement of accounts. At that time the transferee is entitled to the share of assets of the transferring partner. For the purpose of ascertaining such share he is also entitled to an account as from the date of the dissolution. What is meant by the share of a partner

44. Section 31 (1).
45. Section 44 (c).

is his proportion of the partnership assets after they have been realised and converted into money, and all the partnership debts and liabilities have been paid and discharged.[46]

30. Minors admitted to the benefits of partnership.—(1) A person who is a minor according to the law to which he is subject may not be a partner in a firm, but, with the consent of all the partners for the time being he may be admitted to the benefits of partnership.

(2) Such minor has a right to such share of the property and of the profits of the firm as may be agreed upon, and he may have access to and inspect and copy any of the accounts of the firm.

(3) Such minor's share is liable for the acts of the firm, but the minor is not personally liable for any such act.

(4) Such minor may not sue the partners for an account or payment of his share of the property or profits of the firm, save when severing his connection with the firm, and in such case the amount of his share shall be determined by a valuation made as far as possible in accordance with the rules contained in section 48 :

Provided that all the partners acting together or any partner entitled to dissolve the firm upon notice to other partners may elect in such suit to dissolve the firm, and thereupon the Court shall proceed with the suit as one for dissolution and for settling accounts between the partners, and the amount of the share of the minor shall be determined alongwith the shares of the partners.

(5) At any time within six months of his attaining majority, or of his obtaining knowledge that he had been admitted to the benefits of partnership whichever date is later such person may give public notice that he has elected to become or that he has elected not to become a partner in the firm and such notice shall determine his position as regards the firm :

Provided that, if he fails to give such notice, he shall become a partner in the firm on the expiry of the said six months.

(6) Where any person has been admitted as a minor to the benefits of partnership in a firm, the burden of proving the fact that such person had a knowledge of such admission until a particular date after the expiry of six months of his attaining majority shall lie on the persons asserting that fact.

(7) Where such person becomes a partner,—

(a) his rights and liabilities as a minor continue up to the

46. Lindley on partnership, 11th ed., p. 427 : Quoted with approval in Hafiz Mohd. Sayeed v. Hakim Haji Abdul Hamid, A. I. R. 1964 Punj. 218, at p. 219.

date on which he becomes a partner, but he also becomes personally liable to third parties for all acts of the firm done since he was admitted to the benefits of partnership, and

(b) his share in the property and profits of the firm shall be the share to which he was entitled as a minor.

(8) Where such person elects not to become a partner,—

(a) his rights and liabilities shall continue to be those of a minor under this section up to the date on which he gives public notice,

(b) his share shall not be liable for any acts of the firm done after the date of the notice, and

(c) he shall be entitled to sue the partners for his share of the property and profits in accordance with sub-section (4).

(8) Nothing in sub-sections (7) and (8) shall affect the provisions of section 28.

Comments

We have noted above that to create partnership between a number of persons they must have entered into a contract to that effect,[47] and that the relation of partnership arises from contract and not from status.[48] That obviously implies that all the essentials of a valid contract are to be satisfied and, therefore, all the partners must be competent to contract. A minor is incompetent to contract, his agreement is void and, therefore, he is incapable of becoming a partner in any partnership firm.[49] If, while creating partnership, a minor is made a full-fledged partner in a partnership firm, the deed would be invalid and the document cannot be enforced even vis-a-vis other partners.[50]

Sub-Sec. (1)

Although an agreement by a minor is void yet he is capable of accepting benefits. This section, therefore, provides that a minor may not be a partner in a firm, but with the consent of all the partners for the time being he may be admitted to the benefits of partnership. The introduction of a minor to the benefits of partnership pre-supposes existence of a valid partnership between persons competent to contract. There can be no partnership of all

47. Sec. 4.
48. Sec. 5.
49. See secs. 10 and 11, Indian Contract Act and Commissioner of Income tax, Bombay v. Dwarkadas Khetan & Co., 1961 S. C. 680 (1961) 2 S. C. R. 821.
50. Dharam Vir v. Jagan Nath, A. I. R. 1963 Punj. 84. Also see Durga Charan v. Akkari Das, A. I. R. 1949 Cal. 617.

minors, but a partnership between persons competent to contract must exist before a minor can be admitted to its benefits.[51]

In *Lachhmi Narain* v. *Beni Ram*,[52] two persons entered into partnership in 1900 under the style Beni Ram Hoti Lal. Hotilal died in 1920 and thereafter Beni Ram continued the business under the old name and style with the partnership funds. Hotilal's minor son (the plaintiff) alleged that after his father's death he was admitted to the benefits of partnership.

Held that the plaintiff (minor) could not be admitted to the benefit of partnership as no partnership existed after the death of Hotilal. Moreover the plaintiff being a minor could not enter into a contract with Beni Ram to form partnership.

It is possible that the major members decide to constitute partnership and admit the minors to the benefits of the said partnership.[53] A guardian is capable of accepting benefits on behalf of a minor.[54] Admission of a minor to the benefits of partnership can be done only with the consent of all the partners.

Sub-Secs. (2), (3) and (4)

The minor thus admitted has a right to such share of the property and of the profits of the firm as may be agreed upon.[55] He however, cannot go to the court of law to enforce his rights in respect of such share so long as he continues admitted to the benefits of partnership. This disability is removed when he is severing his connection with the firm.[56] He can also have access to any of the accounts of the firm and can inspect and copy them.[57] In this matter his position is different from a partner of the firm. A partner has a right to have access to and to inspect and copy any of the *books* of the firm[58] whereas a minor's right has been limited to *accounts* only. It was considered dangerous to allow a person other than a real partner to have access to the secrets of the firm.

Every partner is jointly and severally liable for all acts of the firm. Moreover his liability is unlimited and can extend to his personal property. A minor, on the other hand, is not personally liable for any such act. It is only his share which is liable for the acts of the firm.[59]

51. Shriram v. Gouri Shankar, A. I. R. 1961 Bom. 136.
52. A. I. R. (1931) All. 327. Also See Haji Hedayatulla v. Mahomed Kamil, A. I. R. (1924) P. C. 93.
53. The Commissioner of Income-tax, Mysore v. Shah Mohandas, A.I.R. 1966 S. C. 15.
54. Ibid., at p. 17.
55. Sec. 30 (2).
56. Sec. 30 (4).
57. Sec.30 (2).
58. Sec. 12 (d).
59. Sec. 30 (3).

Sub-Sec. (5)—Option on attaining majority

At any time within six months of his attaining majority or of obtaining knowledge that he had been admitted to the benefits of partnership, whichever date is later, he can elect to become or not to become a partner, such option is exercised by giving a public notice under S. 72 of the Act. If he remains silent and fails to give such a notice there is a presumption that he wants to be a partner and on the expiry of the said six months he shall become a partner in the firm.

Sub-Sec. (6)

Sub-Sec. (5) contemplates that the guardian may have accepted the benefits of a partnership on behalf of a minor without his knowledge.[60]

Sometimes the minor may remain ignorant of his admission to the benefits of partnership even after he has attained majority. According to Sub-Sec. 6) the burden of proving the fact that such person had no knowledge of such admission until a particular date after the expiry of six months of his attaining majority shall lie upon the person asserting that fact. The Act, however, is silent as to who will have to prove that the minor obtained the knowledge of his admission after he attained majority but before the said period of six months from that date expired. Such cases would presumably be decided by the general rule contained in Sec. 101, Indian Evidence Act.

Sub-Sec. (7)—His position if he becomes a partner

We have seen above that such a minor becomes a partner in the firm—

(i) when he himself elects to become a partner, or

(ii) fails to give the required public notice of his intention to become or not to become a partner within the specified time.

So far as his rights and liabilities vis-a-vis partners of the firm are concerned they continue to be the same upto the date on which he becomes a partner. Moreover his share in the property and profits of the firm shall be the same to which he was entitled as a minor.

Towards the creditors of the firm he becomes personally liable for all the acts of the firm not from the date of his attaining majority, not from the date of his becoming a partner but retrospectively from the date of his admission to the benefits of partnership. His position under English law is different and there

60. The Commissioner of Incometax, Mysore v. Shah Mohandas, A. I. R. 1966 S. C. 15, at p. 17.

his liability does not extend retrospectively from the date of his admission to the benefits of partnersnip, but is only from the date of his attaining majority.[61]

Sub-Sec. (8)—His position when he elects not to become a partner

Whe he elects not to become a partner, his rights and liabilities continue to be the same as that of a minor upto the date of his giving public notice. His liability as regards his share in the firm continues only up to the date of the notice. Thereafter, neither his share in the firm is liable, nor there arises any question of his personal liability.

Sub-Sec. (9)

If, however, after attaining majority he represents or knowingly permits himself to be represented as a partner in the firm, his liability on the ground of holding out can still be there.

61. Code and Bennion v. Harrison 5 Barn. & Ald. 147 : 24 R. R. 307.

CHAPTER V

INCOMING AND OUTGOING PARTNERS

Introduction

This chapter deals with the change in the contitution of the firm either when a new partner is introduced or an old partner leaves the firm.

Introduction of a new Partner.—A new partner may be admitted to the firm in the following ways :—

1. With the consent of all the existing partners.

2. In accordance with a contract between the partners. For example, if the partners have already agreed that one of them can nominate his son as a partner then the introduction of such a partner is possible in accordance with the abovestated contract, *i. e.*, by nomination.

3. A minor who had been admitted to the benefits of partnership on attaining majority may elect to become a partner and he thereby becomes a partner as provided in Sec. 30 (5). If the minor on attaining majority does not exercise his option within a period of six months of his attaining majority or obtaining the knowledge that he had been admitted to the benefits of the partnership firm, then on the expiry of such period he automatically becomes a partner.

A person who is introduced as a partner into the firm becomes liable for all acts of the firm from the date of his admission. He is not liable for the acts done prior to his admission. However, a person who was admitted to the benefits of partnership as a minor and becomes a partner on attaining majority, he becomes liable for all acts of the firm done since the date of his admission to the benefits of partnership.

A persons may cease to be a partner in the following ways :—

1. By retirement,
2. By expulsion,
3. By insolvency,
4. By death.

1. Retirement of a partner

Retirement means voluntary withdrawal of a partner from the firm. A partner may retire in the following ways :—

(i) **With the consent of all the other partners.**—When a person became a partner with others, he cannot be allowed to withdraw from the firm at his sweet will as there is a possibility of the whole business being dislocated. If, however, all the partners agree, anyone of them may retire with their consent. Such consent may be express or implied.

(ii) **In accordance with express agreement between the partners.**—The partners in their agreement may have provided for some procedure in accordance with which the retirement of a partner could possibly be there. For example, if the agreement provides that a partner could retire when majority of the other partners give their permission for the same, retirement in accordance with this contract can be there.

(iii) **In a partnership at will a notice to others.**—If the partnership is not for a fixed term but is at will, as explained in sec. 7 of the Act, any partner can retire by giving a notice in writing to all the other partners of his intention to retire.

Liability of a retiring partner for acts done before his retirement :

According to sec. 25 every partner is liable for all acts of the firm done while he is a partner. Therefore, if a partner retires today he has already become liable for the acts of the firm which have been done till today and he continues to be liable for such acts done prior to his retirement inspite of his retirement. Section 32 (2) provides a procedure whereby the retiring partner may be discharged from such liability which would otherwise be there. The procedure suggested is a *novation*. That meas an agreement between the three parties *i. e.*, the outgoing partner, willing to be discharged from his liability, the continuing partners agreeing to undertake the liability of the outgoing partner also and the creditors, giving their consent to this change. In *Evans* v. *Drummond* the two partners A and B executed a bill in favour of X. Thereafter A retired and on the due date B did not pay the bill but gave another bill to X in exchange for this bill and this new bill was signed only by B. It was held that by accepting the bill signed only by B, X had agreed to discharge A from liability.

Liability of the retiring partner for acts done after retirement :

Although by retirement a partner ceases to be a partner but his liability for the acts of the firm done after retirement still continues until a public notice of retirement has been given. The reason is that while such a person was a partner there was mutual agency between the partners. But when the mutual agency comes to an end a third party, who does not know of this change, can presume that such mutual agency still continues to be there. It is,

therefore, in the interest of the retiring partner as well as the continuing partners that a public notice of retirement is given. Such a notice may be given either by the retired partner or by any member of the re-constituted firm. A public notice, however, is not needed to be given by a person who was not known to be a partner to third parties because proviso to Sec. 32 (3) says that a retired partner is not liable to any third party who deals with the firm without knowing that he was a partner.

2. Expulsion of a partner

Expulsion means making a partner to leave the firm when he is unwilling to go out. Sec. 33 provides that no majority of the partners can expel a partner unless the following two conditions are satisfied :—

(i) The power to expel has been conferred by a contract between the partners, and

(ii) Such power has been exercised in good faith.

If the expulsion is not in good faith it would be void and the expelled partner can claim to be reinstated. In *Blisset* v. *Daniel* one partner opposed the appointment of another partner's son as a manager in the firm and he was expelled. It was held that such expulsion was void. But if a partner is found to be travelling without ticket and he has been found guilty of this offence, expulsion of such a partner has been considered to be in the interest of the firm and held to be justified (*Carmichael* v. *Evans*).

The position of an expelled partner for the acts done by the firm before and after his expulsion, is exactly the same as that of a retired partner. It means that generally he would be liable for acts done while he was a partner. His liability for acts done after expulsion can be avoided by giving a public notice of his expulsion.

3. Insolvency of a partner

According to sec. 34 when a partner of a firm is adjudicated insolvent, he ceases to be a partner. It is possible that when one partner ceases to be a partner because of his insolvency the other partners may continue the business of the firm. The estate of such insolvent partner is not liable for any act of the firm done after the date of his insolvency. In case of such a partner the need for a public notice is not there because the fact of insolvency is deemed to have come to the notice of all those who are interested in his credit.

4. Death of a partner

On the death of a partner the firm may not be dissolved and other partners may continue the business. The position of the estate of a deceased partner is the same as that of an insolvent

partner. His estate cannot be made liable for acts of the firm done after his death (Sec. 35).

Rights of an outgoing partner

Sections 36 and 37 confer the following rights on an outgoing partner :—

1. Right to carry on a competing business.

An outgoing partner may carry on a competing business with that of the firm but he is not allowed to use the firm name or represent himself to be carrying on the business of the firm or solicit the custom of persons who were dealing with the firm before he ceased to be a partner.

This is subject to contract between the partners to the contrary.

An outgoing partner may make an agreement with his co-partners that on ceasing to be a partner he will not carry on any business similar to that of the firm within a specified period or within specified local limits. Although the agreement in restraint of trade is void under sec. 27 of the Contract Act but abovestated agreement between the outgoing partner and the other partner has been declared to be valid by sec. 36 (2) of the Act.

2. Right to share profits subsequent to leaving the firm.

When share of the property of an outgoing partner is not paid to him immediately but that continues to be used in the firm by the remaining partners, the outgoing partner or his estate are entitled :—

Either (i) to such share of the profits made since he ceased to be a partner as may be attributable to the use of his share of the property of the firm, or (ii) to an interest at the rate of 6 per cent per annum on the amount of his share in the property of the firm.

If the surviving or the continuing partners agree to purchase the share of the outgoing partner then he is not entitled to the benefit discussed above.

Sec. 38 of the Act provides that when there is a change in the constitution of the firm *i. e.*, when a new partner is introduced or an existing partner ceases to be a partner, a continuing guarantee given to the firm or to a third party in respect of the transaction of the firm is revoked as to future transactions, unless there is an agreement to the contrary. In case of *N. C. Mukerjee* v. *B. D. Mukerjee* there was a change in the constitution of the firm and it was held that the surety was discharged as to future transactions in respect of a continuing guarantee given by him for the conduct of the cashier of the firm.

INCOMING AND OUTGOING PARINERS

31. Introduction of a partner.—(1) Subject to contract between the partners and to the provisions of section 30, no person shall be introduced as a partner into a firm without the consent of all the existing partners.

(2) Subject to the provisions of section 30, a porson who is introduced as a paıtner into a firm does not thereby become liable for any act of the firm done before he became a partner.

Comments

Sub-Sec. (1)

A new partner can be introduced into a firm in the following ways :—

(1) With the corsent of all the existing partners ;

(2) In accordance with a contract between the partners ;

(3) In accordance with the provisions of sec. 30.

(1) Introduction with the consent of the partners

The relationship between the partner is based upon mutual confidence and trust. For the harmonious working of a partnership it becomes necessary that a new partner should not be introduced without the consent of all the partners. This section, therefore, provides the general rule that no person shall be introduced as a partner into the firm without the consent of all the existing partners.

(2) Introduction in accordance with a contract between the partners

The rule stated above is subject to contract between the partners. If a prior contract between the partners permits the introduction of a new partner even without the consent of all the existing partners that can possibly by done. For example, the contract provides that majority of the partners shall be competent to admit a new partner or any one of them may nominate a partner to appoint his successor, a new partner could be introduced accordingly.

In such cases even if some of the partners are unwilling to the introduction of some particular person, they will be bound by their contract and the introdution will be valid. The position as explained in *Lovegrove* v. *Nelson*[1] is : "To make a person a partner with 2 others, their consent must clearly be had, but there is no particular mode or time required for giving that consent ; and if three enter into partnership by a contract which provides that, on one retiring one of the remaining two, or even a fourth person, who is no partner at all, shall name the successor to take the share of one retiring, it is clear that this would be a valid contract which the court must recognise and the new partner would come in as entirely by the consent of the other two, as if they had adopted him by name."

1. (1834) 3 My & K. 1, 20 ; 41 R. R. 1, 7.

In *Byrne* v. *Reid*'[2] A, B, C and D were four partners and they, in their partnership deed, authorised A to admit his son, S into partnership when S had attained the age of twentyone years. When S attained the age of twenty-one years A nominated him as a partner in accordance with the partnership deed and he accepted the nomination, but the other partners refused to recognise him as a partner. It was held that the son on accepting the nomination had become a partner. The nominee in such cases is not bound to become a partner but he has the option to do so or not.[3]

It may be mentioned that in order that a person becomes a partner he himself also must have consented to that. The nominee becomes a partner, when after nomination, he expressly or impliedly, agrees to the same.[4]

(3) A minor admitted to the benefits of partnership becoming a partner

A minor admited to the benefits of partnership can become a partner according to the procedure mentioned in section 30 (5). When a minor was admitted to the benefits of partnership, he may make an election, within 6 months of his attaining the majority or obtaining knowledge that he had been admitted to the benefits of partnership, whichever date is later, and give a public notice whether he becomes a partner or not. If he opts to become a partner by such notice, he becomes a partner of the firm. If he fails to give such notice within the abovestated time, then on the expiry of such time, he automatically becomes a partner.

Sub-Sec. (2) – His Liability

It has already been observed that according to section 25 : "Every partner is liable.....for all the act of the firm done while he is a partner." This sub-section confirm this rule and states that an incoming partner "does not thereby become liable for any act of the firm done before he became a partner". It is clear that as a general rule the liability of an incoming partner begins from the date of his joining the firm.

Nothing can, however, prevent a partner from agreeing to be liable for the acts done before his admission. If he makes such an agreement with his co-partners the same will be binding only between him and the co-partners and the third parties cannot take advantage of such an agreement. The creditors can make him liable if they can show that the incoming partner had agreed with them, expressly or impliedly, for being liable towards them for the debts incurred before his admission. The basis of liability for

2. (190) 2 Ch. 735 ; Also see Page v. Cox 10 Hare 163 ; Wainwright v. Waletman 1 Ves. Jun. 311 ; Milliken v. Milliken, 8 Ir. Eq. 16.
3. Pigott v. Bagley, Mc Cl. & Y. 569 ; Madgwick v. Wimble, 6 Beav. 495 ; Page v. Cox 10 Hare 163
4. Mulchand v. Manekchand (1906) 8 Bom. L. R. 8.

the past acts, in such a case, will be the agreement rather that the fact of his admission as a partner.

The position of a minor becoming a partner under sec. 30 is, however, different. His liability towards third parties does not commence from the date of his becoming a partner, but, it relates back to the date of his admission to the benefits of partnership.[5]

32. Retirement of a partner.—(1) A partner may retire—

(a) with the consent of all the other partners,

(b) in accordance with an express agreement by the partners, or

(c) whether the partnership is at will, by giving notice in writing to all the other partners of his intention to retire.

(2) A retiring partner may be discharged from any liability to any third party for acts of the firm done before his retirement by an agreement made by him with such third party and the partners of the reconstituted firm and such agreement may be implied by a course of dealing between such third party and the reconstituted firm after he had knowledge of the retirement.

(3) Notwithstanding the retirement of a partner from a firm, he and the partners continue to be liable as partners to third parties for any act done by any of them which would have been an act of the firm if done before the retirement, until public notice is given of the retirement :

Provided that a retired partner is not liable to any third party who deals with the firm without knowing that he was a partner.

(4) Notices under sub-section (3) may be given by the retired partner or by any partner of the reconstituted firm.

Comments

Retirement of a partner

Retirement here means voluntary withdrawal of a partner from the firm. It covers cases where a partner retires but the firm is not dissolved and it continues with the remaining partners. If a partner withdraws from the firm by dissolving it, it is dissolution of the firm rather than retirement of a partner.

Sub-Sec. (1)—How can partner retire ?

A partner may retire in the following ways :

(i) With the consent of all the other partners.—As a general rule no partner can retire whenever he likes. The partnership

5. S. 30 (7) (a).

business depends upon the continued support from all the partners. The retirement of a partner might mean a serious dislocation of the whole business. A partner can, therefore, retire with the consent of all the other partners. Such consent may be express or implied.

(2) In accordance with express agreement by the partners.—In case the agreement between the partners themselves condones the requirement of the consent of them all, a partner may retire accordingly. For instance, the partneship deed provides that a partner may retire with the consent of the majority of other partners or by giving one year's notice, a partner can retire in accordance with such an agreement.

(3) In Partnership at will by a notice to others.—In case of partnership at will,[6] a partner may retire by giving a notice in writing to all the other partners of his intention to retire. When it is partnership at will a partner has a right either to retire or even to dissolve the firm[7] by giving a notice to the others partners to that effect.

The English law is stricter, so far as a partner's right to retire is concerned. There is only one method by which a partner can retire from a firm without the consent of his co-partners, and that is, by dissolving the firm.[8]

His position after retirement.—The question arises regarding his liability for the acts of the firm done :—

(1) Before his retirement

(2) After his retirement.

(1) Sub-Sec. (2) - Liability for acts done before his retirement.

Every partner is liable for all acts of the firm done while he is a partner.[9] If liability has arisen during the period while a person was a partner, such liability does not come to an end by his retirement. He may, however, be discharged from such liability by what is known as *Novation*. Novation means substitution, with the creditor's consent, of a new debtor for an old one. This is done by substituting a new contract in place of an old one, thereby discharging the liability of the original debtor and creating that of a new one in his place. It is essential that the creditor must agree to such a substitution. In partnership when the creditor accepts the security of continuing partners in discharge of that of the former partners, the outgoing partner is thereby discharged from his liability towards such creditor. Sub-sec. (2) requires that for the proper discharge of the retiring partner from

6. See sec. 7.
7. See sec. 43.
8. Lindley on Partnership, 12th Ed. p. 598.
9. See sec. 25.

liability there should be contract between all the three parties *viz.* the outgoing partner, the members of the reconstituted firm and the creditor. Mere agreement between the outgoing and the continuing partners that only the continuing partners will be liable for all the past acts does not discharge the outgoing partner from his liability towards the creditor. The concurrence of the creditor also must be there to such a contract. Such an agreement need not always be express, it may be implied by a course of dealing between such third party (creditor) and the reconstituted firm after he had the knowledge of the retirement.

In *Evans* v. *Drummond*[10] A and B, the two partners in a firm executed a bill in favour of the creditor X. A retired and thereafter on the due date the bill was not paid to X but a new bill signed only by B was given to X, who fully knew of the change in the firm. If was held that by accepting the new bill signed only by the continuing partner, the creditor had relied on his sole security, and had discharged the retiring partner from liability.

(2) Sub-Sec. (3)—Liability for the acts done after his retirement.

By retirement a person ceases to be a partner. The third parties can still presume mutual agency between the outgoing and the continuing partners, until a public notice of retirement is given. In the absence of a public notice the outgoing partner and the continuing partners continue to be liable for the act of each other towards third parties. In order to avoid such liability it is in the interest of both the retiring and the continuing partners that public notice is given. It has, therefore, been provided in sub-sec. (4) that such a notice may be given either by the retired partner or any partner of the reconstituted firm.

The liability stated above which arises in the absence of public notice is nothing but the application of the doctrine of holding out. There is a presumption that a person who was known to be a partner continues to be so known to the third parties until the notice of retirement is given.

The principle was thus explained in *Scarf* v. *Jardine*[11] :

"The principle of law, which is stated in Lindley on Partnership[12] is inconvertible, namely, that 'when an ostensible partner retires, or when a partnership between several known partners is dissolved, those who dealt with the firm before a change took place are entitled to assume, until they have notice to the contrary, that no change has occurred ; and the principle on which they are entitled to assume is that of the estoppel of a person who

10. 4 Esp. 89 : Reed v. White 5 Esp. is also a decision to the same effect.
11. (1882) 7 A. C. 345. Lord Selborne at pp. 349, 350.
12. Also see Lindley on Partnership, 12th Ed. p. 262.

has accredited another as his known agent from denying that agency at a subsequent time as against the persons to whom he has accredited him, by reason of any secret revocation.' Of course in partnership there is agency—one partner is agent of another ; and in the case of those who under the direction of the partners for the time being carry on the business according to the ordinary course, where a man has established such an agency, and has held it out to others, they have a right to assume that it continues until they have notice to the contrary."

Dormant Partner

If a dormant partner (i. e. a person who is not known to be a partner), retires, he is not liable for the acts of the firm done after his retirement even though no notice of retirement has been given.[13]

Proviso to sec. 32 (3) states that "a retired partner is not liable to any third party who deals with the firm without knowing that he was a partner."

The basis of the liability of the retired partner after his retirement as seen above, is that the creditor still believing him to be a partner gives credit to the firm. There is, obviously, no need of applying that principle to a partner who is not known to be one. The case of *Tower Cabinet Co., Ltd.* v. *Ingram*[14] explains this point. In that case Ingram and Christmas were partners in a firm known as Merry's. The partnership was dissolved but Christmas carried on the business in the same firm name. Public notice of the dissolution of the firm was not given. Christmas placed an order, on the old notepaper bearing the names of both Ingram and Christmas, with Tower Cabinet Co. It was held that Ingram was not liable as Tower Cabinet Company had no knowledge that Ingram was a partner before the date of dissolution. The mere fact that the retiring partner did not see to the destruction of the old notepapers bearing his name could not make him liable to the creditors with whom communications were made on one such notepaper.

The proviso protects the dormant partner from liability towards such third parties who did not know him to be a partner. If a third party had the knowledge of such person being a partner but had no notice of his retirement, the proviso does not bar him from bringing an action even against such person who is generally not known to be a partner.

33. Expulsion of a partner.—(1) A partner may not be expel-

13. See Carter v. Whalley 1 B. & Ad. 11, Heath v. Sansom 4 B. & Ad. 172; Evans v. Drummond 4 Esp. 89; Juggilal Kamlapat v. Sew Chand (1960) Cal. 463; Tower Cab. Co. v. Ingram (1949) All. E. R. 1033.

14. (1949) 2 K. B. 397 ; Refer also to Juggilal Kamlapat v. Sew Chand Bagree (1960) Cal. 463: Proviso to sec. 45 (1) also states a similar rule when there is a dissolution of the firm.

led from a firm by any majority of the partners, save in the exercise in good faith of powers conferred by contract between the partners.

(2) The provisions of sub-sections (2), (3) and (4) of section 32 shall apply to an expelled partner as if he were a retired partner.

Comments

This section provides the general rule that a partner cannot be expelled from the firm by any majority of the partners. Expulsion of a partner is possible, in exceptional cases, when the following two conditions are there :

1. The power to expel has been conferred by a contract between the partners, and

2. Such a power has been exercised in good faith.

No expulsion is possible unless a power to that effect has been conferred by a contract. This power must be exercised in good faith for the general interest of the whole firm. If the expulsion is *mala fide* the same is void. In *Blisset* v. *Daniel*[15], wo-thirds majority of the partners, having been conferred witht the power to expel, expelled one partner. It was found that the real reason for the expulsion was that the said partner had opposed the appointment of a co-partner's son as a co-manager with his father. It was held that the expulsion was void.

Explusion of a partner, who has been held guilty of an offence, has been considered to be justified. In *Carmichael* v. *Evans*,[16] the power to expel existed against any partner who was addicted to scandalous conduct detrimental to the partnership business or was guilty of any flagrant breach of duties relating to partnership business. One of the partners was convicted for travelling without ticket and he was given a notice of the expulsion by the other partners. It was held that the notice of expulsion given under these circumstances was justisfied.

As regards liability towards third parties for acts of the firm done either before or after expulsion the position of the expelled partner is exactly the same as that of a retired partner. It means that as a general rule he continues to be liable for the acts which were done while he was a partner, but for the acts done after his expulsion he can be made liable unless a public notice of expulson has been given.

34. Insolvency of a partner.— (1) Where a partner in a firm is adjudicated an insolvent he ceases to be a partner on the date

15. (1853) 10 Hare 493 : 90 R. R. 454; Also see Wood v. Wood, (1874) L. R. Ex, 190.
16. (1904) 1 Ch. 486.

on which the order of adjudication is made, whether or not the firm is thereby dissolved.

(2) Where under a contract between the partners the firm is not dissolved by the adjudication of a partner as an insolvent, the estate of a partner so adjudicated is not liable for any act of the firm and the firm is not liable for any act of the insolvent, done after the date on which the order of adjudication is made.

Comments

Sub-sec. (1).—A person who is adjudicated insolvent is not allowed to continue as partner and, therefore, he ceases to be a partner on the date on which order of adjudication is made. Whether on adjudication of a partner as insolvent the firm is also dissolved or not depends upon the contract between the partners. According to sec. 42 (d), unless the partners agree otherwise, a firm is dissolved by the adjudication of a partner as insolvent.

Sub-sec. (2).—Where the firm is not dissolved on the adjudication of a partner as insolvent and the other partners agree to continue the business, the estate of the insolvent partner is not liable for an act of the firm after the date of adjudication. In his case he is absolved from liability for future acts even though no public notice of his being adjudicated insolvent is given. His position is, therefore, different from the retired or the expelled partner, whose liability for the acts of the firm continues unless a public notice of retirement or expulsion is given. The reason why such a notice has been dispensed with is that insolvency is itself a notorious fact which is not required to any body.

35. Liability of estate of deceased partner.—Where under a contract between the partners the firm is not dissolved by the death of a partner the estate of a deceased partner is not liable for any act of the firm done after his death.

Comments

Although on the death of a partner a firm is dissolved but, if the other partners so agree, the firm may not be dissolved[17] and the business of the firm may be continued with the remaining partners. The position on the death of a partner is similar to that which has been noted in the previous section regarding an insolvent partner. No public notice is required to be given on the death of a partner also and the estate of a deceased partner is not liable for any act of the firm done after his death.

36. Rights of outgoing partner to carry on competing business.—(1) An outgoing partner may carry on a business competing with that of the firm and he may advertise such

17. Sec. 42 (c).

business, but, subject to contract to the contrarty, he may not—

(a) use the firm name,

(b) represent himself as carrying on the business of the firm, or

(c) solicit the custom of persons who were dealing with the firm before he ceased to be a partner.

(2) **Agreements in restraint of trade.**—A partner may make an agreement with his partners that on ceasing to be a partner he will not carry on any business similar to that of the firm within a specified period or within specified local limits ; and notwithstanding anything contained in section 27 of the Indian Contract Act, 1872, such agreement shall be valid if the restrictions imposed are reasonable.

Comments

Sub-sec. (1).—This Section deals with the right of the outgoing partner with regard to some other business which he may like to carry on. Sub-sec. (1) states that an outgoing partner, whether he leaves the firm by retirement, expulsion or insolvency, has a right to carry on a business competing with that of the firm. He may also advertise such business. This right to carry on the competing business is, however, subject to three restrictions :

1. He cannot use the name of the firm for his business.

2. He cannot represent himself as carrying on the business of the firm. After he goes out he severs his connection with the firm and, therefore, he is not allowed to mislead the public by misrepresenting that he is still carrying on the firm's business.

3. He cannot solicit the custom of persons who were dealing with the firm. He cannot approach the old customers to persuade them to be diverted towards his busines. It has been noted above that he can advertise his own business and if the old customers themseves prefer to come to him there is no bar to his attending to them.

The abovestated restrictions on the outgoing partner are necessary to protect the interest of the firm which he leaves. The restrictions are similar to those which are imposed on a person who sells the goodwill of his business. When a partner leaves the firm he gets his share of the assets. Such share generally includes payment for his share of the goodwill also. Outgoing partner is presumed to have sold the goodwill to the remaining partners and, therefore, restrictions as stated above are applicable to him. These restrictions are subject to contract between the outgoing and the other partners. The provision contained in this sub-section is similar to the one contained in sec. 55 (2), where the goodwill of a firm is sold on the dissolution of a firm.

Sub-sec. (2).—This sub-sec. permits an agreement being made between the outgoing partner and the continuing partners whereby the outgoing partner be restrained from carrying on business similar to that of the firm. Such an agreement has been declared to be valid and constitutes an exception to the rule contained in sec. 27, Indian Contract Act, which declares an agreement in restraint of trade as void. It is, however, necessary that :

(i) The agreement restraining the outgoing partner from carrying on a similar business should stipulate that such a business will not be carried on for a specified period or within specified local limits, and

(ii) The restrictions imposed should be reasonable.

37. Rights of outgoing partner in certain cases to share subsequent profits.—Where any member of a firm has died or otherwise ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with the property of the firm without any final settlement of accounts as between them and the outgoing partner or his estate, then, in the absence of a contract to the contrary, the outgoing partner or his estate is entitled, at the option of himself or his representatives, to such share of the profits made since he ceased to be a partner as may be attributable to the use of his share of the property of the firm or to interest at the rate of six per cent per annum on the amount of his share in the property of the firm :

Provided that where by contract between the partners an option is given to surviving or continuing partners to purchase the interest of a deceased, or outgoing partner, and that option is duly exercised, the estate of the deceased partner, or the outgoing partner or his estate, as the case may be, is not entitled to any further or other share of profits ; but if any partner, assuming to act in exercise of the option, does not in all material respects comply with the terms thereof he is liable to account under the foregoing provisions of this section.

Comments

When a partner ceases to be a partner by retirement, expulsion, insolvency or death his share in the property of the firm may not be immediately paid to him and the firm may continue the business without any final settlement of accounts between the outgoing partner or his estate and the others. This section gives an option to the outgoing partner or the representative of the deceased partner, who has not been paid his share of the property.

either (i) to claim such share of the profits made since he ceased to be a partner as may be attributable to the use of his share of the property of the firm,

or, (ii) to claim an interest at the rate of 6% per annum on

the amount of his share in the property of the firm.

This is subject to the contract between the partners to the contrary.

The abovestated option can be exercised by the outgoing partner or on behalf of the deceased partner when subsequently the profits are calculated. He can then exercise this option the way he finds the same to be more beneficial to him. But once the option is made it becomes binding on the person making it.

Where by a contract between the partners the surviving or the continuing partners purchase the share of the outgoing or the deceased partner, the right of sharing profits as discussed above is lost. If, however, the partner who was to purchase such share of the outgoing or the deceased partner does not comply with the terms of the contract of purchase in all material respects, he is liable to account for the right of the outgoing or the deceased partner as stated above.

38. Revocation of continuing guarantee by change in firm.— A continuing guarantee given to a firm, or to a third party in respect of the transactions of a firm, is, in the absence of agreement to the contrary, revoked as to future transactions from the date of any change in the constitution of the firm.

Comments

If there is a change in the constitution of the firm either by the introduction of a new partner to the firm or by a partner ceasing to be one, any continuing guarantee, given to the firm or to the third party in respect of the transaction of the firm, is automatically revoked as to future transactions unless there is an agreement to the contrary. The basis of the rule is that when there is continuing guarantee given to the firm or to the third party by the firm that is always with the assumption that the same persons who are partners at the time of such guarantee shall continue to be there for the whole period of such guarantee. Therefore, such a guarantee continues to be operative so long as there is no change in the constitution of the firm, but upon such a change the guarantee is revoked as regards future transactions. This point can be explained by refering to the case of *Neel Comul Mookerjee* v. *Bipro Das Mookerjee*.[18] In that case a guarantee was given for the conduct of the cashier of the firm known as "N. C. Mookerjee". Subsequently, there was a change in the constitution of the firm and its name was also changed to "N. Mookerji & Son". It was held that on this change the guarantee was revoked and the surety was not liable for the conduct of the cashier subsequent to such change.

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18. (1901) 28 Cal. 597.

CHAPTER VI

DISSOLUTION OF A FIRM

Introduction

Dissolution means coming to an end of the relation of partnership between various partners. When there is dissolution of partnership between all the partners it is known as dissolution of the firm. A firm may be dissolved in the following ways :—

1. Dissolution with the consent of all the partners (Sec. 40) :

As all the partners could create partnership by their mutual agreement, they can similarly dissolve the firm by making an agreement to that effect.

2. Dissolution in accordance with a contract between the partners (Sec. 40) :

There may be a previous contract between the partners mentioning the circumstances or the procedure for the dissolution of the firm, the firm may be dissolved in accordance with such a contract.

3. Dissolution by a notice when the partnership is at will (Sec. 43):

When the partnership is a partnership at will, as defined in sec. 7, *i. e.*, that the firm was not constituted for a fixed term, such a firm may be dissolved by a notice in writing by any partner to all the other partners indicating his intention to dissolve the firm. The firm stands dissolved from the date mentioned in the notice. If the notice does not mention any date, the dissolution takes effect from the date of communication of the notice.

4. Compulsory dissolution (Sec. 41) :

On the happening of the following events there is compulsory dissolution of the firm :—

(i) By the adjudication of all the partners or all except one as insolvent the firm is compulsorily dissolved. When a partner is adjudicated as insolvent, he ceases to be a partner and, therefore, when all the partners or all except one are adjudicated insolvent they cease to be partners and there is no question of their continuing as partners. There has to be dissolution of the firm. The dissolution being compulsory, the partners cannot make the firm to continue by making an agreement to that effect.

(ii) When the business of the firm becomes unlawful there has to be compulsory dissolution of the firm. Similar-

ly, when it becomes unlawful for the partners to carry on the business in partnership then also the firm is compulsorily dissloved.

5. Dissolution on happening of certain contingencies (Sec. 42.) :

On the happening of the following events the firm is automatically dissolved unless there is a contract to the contrary :

(i) If the firm was constituted for a fixed term it stands dissolved on the expiry of that term.

(ii) If the firm was constituted to carry out certain adventures or undertakings, the firm is dissolved when those adventures or undertakings are completed.

(iii) When a partner dies there is dissolution of the firm.

(iv) A firm is also dissolved when a partner is adjudicated insolvent.

It has been noted above that the dissolution as contemplated in section 42 occurs unless there is contract to the contrary. It means that even if any one of the abovestated events happens the firm may not be dissolved if the partners are interested in continuing the business of the firm and they agree, expressly or impliedly, to that effect.

6. Dissolution by Court (Sec. 44) :

When only some of the partners are interested in the dissolution of the firm and others oppose it, the persons interested in dissolution can apply to the court and the court may order the dissolution of the firm. A suit for dissolution can be filed when one or the other of the following grounds are there :—

(a) When a partner becomes of unsound mind an application for dissolution may be made either on behalf of such a person or by any other partner.

(b) When a partner becomes permanently incapable of performing his duties, an application for dissolution could be made by any other partner.

(c) When a partner is guilty of some misconduct which is likely to affect prejudicially carrying on the business of the firm, the other partners can apply for the dissolution of the firm. Misconduct here may mean misconduct even towards a third party. For example, when a partner of a firm of bankers has been held guilty of misappropriation of funds, the other partners can apply for dissolution of the firm.

(d) When a partner makes a persistent breach of the partnership agreements any partner other than that partner

can apply for dissolution of the firm.

(e) When a partner transfers the whole of his interest in the firm to a third party or he has allowed his interest to be charged under the provisions of the Civil Procedure Code or he has allowed it to be sold in the recovery of the arrears of land revenue or some such dues, the other partners can apply for the dissolution of the firm.

(f) The object of the partners is to make and share profits and if there is no possibility of making profits but it appears that the business of the firm cannot be carried on except at a loss, any partner can apply to the court for the dissolution of the firm.

(g) The court is empowered to dissolve a firm on any other ground than as stated above if it appears to the court to be a just and equtiable ground for dissolution. For example, if the mutual confidence and trust between the partners is lost, an application or dissolution can be made. In *Abbot* v. *Crump* it has been held that when one partner commits adultery with the wife of another partner, it is a fit ground for the dissolution of the firm by the court.

Liability after dissolution.—By dissolution even though as between the partners the relationship comes to an end but from the point of view of the third parties the mutual agency between the partner continues unless steps are taken to make the third parties aware of the same. Sec. 45 provides that notwithstanding the dissolution of a firm, the partners continue to be liable as such to third parties for any act done by any of them, if such an act would have been act of the firm if done before dissolution, until public notice of the dissolution is given. Such a notice may by given by any partner.

No public notice is needed when a partner dies, or is adjudicated insolvent, or is one who is not known to be a partner to the third party dealing with the firm. The estate of the deceased or the insolvent partner, or the partner, who is not known to be so to the third party would not be liable for an act of the firm done after he ceases to be a partner even though no public notice has been given.

Winding up.

After there is dissolution of the firm winding up of the affairs of the firm has to be there. Winding up includes completion of the transaction begun but unfinished at the time of the dissolution, performing the contracts which have already been entered into, payment to the creditors of the firm, realising the debts due to the firm and, if necessary, filing suit for the same, disposing off the

assets of the firm and converting them into cash, and refund of capital to the partners. Although mutual agency for the purpose of carrying on the business of the firm comes to an end by the dissolution of the firm, but for the purpose of winding up mutual agency between the partners still exists until the affairs of the firm have been completely wound up. (Sec. 47).

Every partner has a right to see that there is proper winding up. On the dissolution of the firm every partner of his representative is entitled, as against all the other partners or their representatives, to have the property of the firm applied for the payment of the debts of the firm, and to have the surplus distributed among the partners or their representatives according to their rights. (Sec. 46). The payment of the debts of the firm out of joint assets is in the interest of all the partners, because if that is not done every partner remains exposed to the risk of being made liable to meet all such liabilities.

When the winding up is going on no partner can make any personal benefit by using the property of the firm, the name or the business connection of the firm. (Sec. 50). If any partner is making use of the firm name or using any property of the firm for his personal profit, the other partners or their representatives may obtain an injunction againt such a partner restraining him from doing that. (Sec. 53). If, however, a partner or his representative purchases the goodwill of the firm, he can make use of the firm name.

Settlement of accounts between partners (Sec. 48).

Losses arising on dissolution are to be shared equally. Loss includes any deficiency in capital as well.

When the firm is being wound up, the amount available is to be utilised, for making various payments, in the following order :

1. Making payment of the debts of the firm to the third parties ;

2. Making payment to the partners rateably in respect of advances given by them over and above capital contributed by them ;

3. Making payment to each partner rateably what is due to him on account of capital ;

4. The residue if any is deemed as profit and that is distributed among partners in their profit sharing ratio.

When there are joint and separate debts, the property of the firm or of partners is to be applied as under :

(i) The property of the firm shall be applied in the first instance in payment of the debts of the firm, and if there is any surplus, then the share of each partner

shall be applied in payment of his separate debts or paid to him.

(ii) The separate property of a partner shall be applied first for paying separate debts, and the surplus, if any, may be utilised for payment of the debt of the firm.

Return of premium on premature dissolution (Sec. 51)

A partner may have paid some premium to secure partnership in an existing firm and also to get the right of remaining a partner in the firm for a fixed term. If there is premature dissolution of the firm, the partner who paid the premium shall be entitled to re-payment of the premium or of such part thereof as may be reasonable, regard being had to the terms on which he became a partner and also the period for which he remained a partner. It may be noted that such a return is permissible when the partnership was for a fixed term. There is to be no refund if the partnership was at will.

Return of premium is not allowed in the following cases :

1. When the dissolution of the firm occurs due to the death of a partner.

2. When the dissolution is mainly due to the misconduct of the partner who had paid the premium.

3. When the dissolution is in pursuance of an agreement between the partners, but the agreement does not make any specific mention of the return of premium.

Rights of a partner rescinding the contract of partnership (Sec. 52)

When there is fraud or misrepresentation in a contract creating partnership between persons, the partner whose consent has been so obtained has a right to rescind the contract and withdraw from the firm. When the contract of partnership is thus avoided, the right of person so rescinding the contract are protected. He can claim compensation on ground of fraud under the law of torts. In addition to that :

1. He has a lien on, or a right of retention of, the surplus assets of the firm, after the debts of the firm have been paid, in respect of any sums paid by him as capital or purchasing the share in the firm.

2. He gets priority in recovery of any amount due to him in respect of payments made by him towards the debts of the firm, as he is deemed to be a creditor of the firm in respect of that amount.

3. He has a right to be indemnified by the partners guilty of fraud or misrepresentation against all the debts of the firm.

Right to carry on competing business after dissolution (Ss. 54 and 55)

On the dissolution of a firm the property of the firm is disposed off. Goodwill is one of the assets of the firm and the same may be sold alongwith other assets or separately. Where the goodwill of the firm is sold after dissolution, a partner may still carry on a business competing with that of the firm and may advertise such business. The partner or partners selling the goodwill cannot :

(i) use the name of the firm ;

(ii) represent that they are carrying on the business of that old firm of which the goodwill has been sold ;

(iii) solicit the custom of person who had been dealing with the firm prior to dissolution.

If, on or anticipation of the dissolution of a firm, or on the sale of goodwill of a firm, there is an agreement that the partners will not carry on any business similar to that of the firm within a specified period or within specific local limits such an agreement will be valid and can be enforced notwithstanding the rule contained in section 27, Indian Contract Act, that an agreement in restraint of trade is void.

Dissolution of a firm

39. Dissolution of a firm.—The dissolution of partnership between all the partners of a firm is called the "dissolution of the firm."

Comments

Dissolution of partnership means coming to an end of the relation, known as partnership, between persons. When one or more partners cease to be partner but others continue the business in partnership, there is dissolution of partnership between the outgoing partners on the one hand and remaining partners on the other. The remaining partners as between themselves still continue as partners. For example, when the firm consists of A, B and C and A retires, there is dissolution of partnership between A and others but partnership as between B and C is not dissolved. Dissolution of partnership between all the partners of the firm is known as dissolution of the firm. For example, when in the firm consisting of A, B and C all of them cease to be partners with one another there is dissolution of the firm.

40. Dissolution by agreement.—A firm may be dissolved with the consent of all the partners or in accordance with a contract between the partners.

Comments

Sections 40 to 44 contain various modes of the dissolution of

a firm. This section mentions two modes of dissolution of a firm :

(i) Dissolution with the consent of all the partners, and

(ii) Dissolution in accordance with a contract between the partners.

As partners can create partnership by making a contract as between themselves, they are also similarly free to end this relationship and thereby dissolve the firm by their mutual consent. When all the partners so agree they may dissolve the firm at any time they like.

Sometimes there may have been a contract between the partners indicating as to when and how a firm may be dissolved, a firm can be dissolved in accordance with such a contract.

41. Compulsory dissolution.—A firm is dissolved—

(a) by the adjudication of all the partners or of all the partners but one as insolvent, or

(b) by the happening of any even which makes it unlawful for the business of the firm to be carried on or for the partners to carry it on in partnership :

Provided that, where more than one separate adventure or undertaking is carried on by the firm, the illegality of one or more shall not of itself cause the dissolution of the firm in respect of its lawful adventures and undertakings.

Comments

This section mentions certain events on the happening of which there is compulsory dissolution of the firm. The dissolution is compulsory and if the partners want to continue in partnership by agreeing to the contrary they cannot possibly do that. Compulsory dissolution occurs under the following circumstances :

(1) When all the partners or all except one are adjudicated insovent the firm is compulsorily dissolved. We have already noted[1] that when a partner is adjudicated insolvent he ceases to be a partner. Therefore, when all the partners or all except one are adjudicated insolvent there is no question of persons remaining partners with one another and, therefore, there has to be dissolution of the firm.

(2) If the business of the firm though lawful when the firm came into existence subsequently becomes unlawful there has to be dissolution of the firm. This provision is based on the rules of the law of contract. For a valid contract the object and consideration have to be lawful as defined in section 23, Indian Contract Act. Sec. 56 of the Contract Act further provides that when the contract to do an act becomes unlawful after making the contract, such a

1. Sec. 34.

contract becomes void. For example, a number of person join together as partners to sell liquor in a certain area. Subsequently the Government imposes prohibition in that area and the sale of liquor is banned. As soon as the sale of liquor in that area becomes unlawful the firm is dissolved.

If the firm was carrying on more than one adventures or undertakings the illegality of one or more of them shall not of itself result in the dissolution of the firm in respect of those adventures or undertakings which are still lawful.

There is also compulsory dissolution of the firm if some event happens because of which it becomes unlawful for the partners to continue as partners with each other. For example, two partners reside and carry on trade in two different countries. [2]If war breaks out between these two countries and further commercial intercourse between the two partners thereby becomes against public policy and thus unlawful, there is compulsory dissolution of the firm.

42. Dissolution on the happening of certain contingencies.— Subject to contract between the partners a firm is dissolved—

(a) if constituted for a fixed term, by the the expiry of that term ;

(b) if constituted to carry out one or more adventures or undertakings by the completion thereof ;

(c) by the death of a partner ; and

(d) by the adjudication of a partner as an insolvent.

Comments

Section 41 mentions certain events on the happening of which there is compulsory dissolution. On the happening of the events mentioned in this section the firm is dissolved unless there is a contract to the contrary. It means that on the happening of the events mentioned in this section the partners may still agree that the firm be not dissolved and the business of the firm be continued as before.

Clause (a)—Expiration of the partnership term.—When the partnership had been constituted for a fixed term it continues obviously for that contemplated term and would be dissolved on the expiry of such term. If the partners so like they may agree to the contrary and continue the business even beyond that time. Such an agreement may be express or implied. If a fresh term is not stipulated then it will be considered to be a partnership at will. Unless otherwise agreed the same mutual rights and duties continue for the extended period as they were there before the expiry of the term.[2]

2. Sec. 17 (b).

Clause (b)—Completion of the adventure.—Partnership created for some specific adventures or undertakings comes to an end on the completion of such adventures or undertakings. There can, however, be an agreement by which the partnership may not be dissolved and the business may be continued for some other adventures or undertakings after the completion of the earlier ones. Unless otherwise agreed the same mutual rights and duties between the partners continue in respect of their relationship for the new adventures and undertakings also.[3]

Clause (c)—Death of a partner.—Death of a partner results in the dissolution of the firm unless the remaining partners agree to the contrary. This provision is applicable when there are more than two partners in a firm, where on the death of one of them the others may agree to still continue the same old firm without its being dissolved. If there are only two partners and they agree that on the death of one of them the firm would not be dissolved but will continue with the surviving partner and the heir of the deceased partner, the agreement is meaningless because on the death of one of them there remains only one partner. There is no partnership to which somebody else could be introduced. If the heir of the deceased partner is to carry on the business in partnership with the surviving partner, it will be a new partnership for which an agreement between the two persons to create partnership has to be entered into. In *Mt. Sughra* v. *Babu*[4], it was held that when a firm consisted of just two partners, a term in their contract not to dissolve the firm on the death of one of them was invalid. Agarwala J. observed :[5]

"In the case of a partnership consisting of only two partners, no partnership remains on the death of one of them and, therefore, it is contradiction in terms to say that there can be a contract between two partners to the effect that on the death of one of them the partnership will not be dissolved but will continue.

Partnership is not a matter of status, it is a matter of contract. No heir can be said to become a partner with another person without his own consent, express or implied."

Similar view was expressed by the Madras High Court in *Narayanan* v. *Umaval*.[6] In *Commissioner of Income-tax* v. *Seth Govindram*[7], the Supreme Court accepted the view of the Allahabad and the Madras High Courts as discussed above and rejected the view expressed by the Calcutta and the Nagpur High Courts to the contrary.

3. Sec. 17 (c).
4. A. I. R. 1952 All. 506.
5. Ibid., at p. 507.
6. A. I. R. 1959 Mad. 283. See Han raj Manot v. Gorak Nath Pandey, 66 C. W. N. 262 : 1962 Cal. L. J. 230 and Chainkaran Sidhakaran v. Radhakisan, A. I. R. 1966 Nag. 46 for a contrary view.
7. A. I. R. 1966 S. C. 24.

Clause (d)—Insolvency of a partner.—When a partner is adjudicated insolvent he ceases to be a partner. The firm is also dissolved unless there is an agreement between the partners, other than the insolvent, to the contrary. This provision has to be read alongwith sec. 41 (a) which states that when all or all except one partner become insolvent there is compulsory dissolution of the firm. If, therefore, there are only two partners and one of them is adjudicated insolvent there is compulsory dissolution under section 41 and there is no question of there being a contract to the contrary making the firm to continue.

43. Dissolution by notice of partnership at will.—(1) Where the partnership is at will, the firm may be dissolved by any partner giving notice in writing to all the other partners of his intention to dissolve the firm.

(2) The firm is dissolved as from the date mentioned in the notice as the date of dissolution or, if no date is so mentioned, as from the date of the communication of the notice.

Comments

Sub-sec. (1)—Dissolution of partnership at will by notice

When the partnership is at will as defined in section 7, the partners are not bound to remain as partners or continue the partnership for any fixed period. Any partner of such a partnership can seek dissolution of the firm. This can be done by a partner by serving a notice on the other partners asking for the dissolution of the firm. The notice to be valid must be in writing, it should be given to all the other partners and it must clearly and in unambiguous terms indicate the intention of the partner giving the notice to dissolve the firm.[8] Dissolution by a notice under this section will be valid even though one of the partners to whom the notice is given is insane.[9] When the partnership was originally constituted for a fixed term, but the partners continue the business even after the expiry of that term, unless otherwise agreed, the partnership is now deemed to be a partnership at will[10] and, therefore, it can now be dissolved by a notice as stated in this section. A notice for dissolution once given cannot be withdrawn unless the other partners agree to the same.[11]

Although a partnership at will can be dissolved by a notice there is, however, nothing which prevents the dissolution of such partnership under the other provisions of the Act. Thus, a partnership at will could also be dissolved by mutual consent, insolvency or death of a partner.

8. See Chainkaran Sidhakaran Oswal v. Radhakrisan, A. I. R. 1956 Nag. 48 : I. L. R. (1955) Nag. 498 : 1956 Nag. L. J. 686.
9. Melleresh v. Keen, (1859) 27 Beav. 236.
10. See sec. 17 (b).
11. Jones v. Lloyd, 18 Eq. 265.

Sub-sec. (2)—Date of dissolution

The partner giving a notice for the dissolution of a partnership at will may mention the date from which he wants the dissolution to be effective. If that is so the firm will be dissolved from the date mentioned in the notice. If no such date has been mentioned the dissolution will take effect from the date of the communication of the notice. A partner could give such a notice without going to the court. But if a partner so likes he may effect the dissolution by going to the court. In such a case "a partnership will be deemed to be dissolved when the summons accompanied by a copy of the plaint is served on the defendant, where there is only one defendant, and on all defendants, when there are several defendants. Since a partnership will be deemed to be dissolved only from one date, the date of dissolution would have to be regarded to be the one on which the last summons were served."[12]

If a partner dies before the dissolution could become effective by a notice of a partnership at will, the dissolution would take place from the date of the death of the partner and the rights of the partners will be the same as they would have been on the dissolution by the death of a partner.[13]

44. Dissolution by the Court.—At the sult of a partner, the Court may dissolve a firm on any of the following grounds, namely—

(a) that a partner has become of unsound mind, in which case the suit may be brought as well by the next friend of the partner who has become of unsound mind as by any other partner ;

(b) that a partner, other than the partner suing, has become in any way permanently incapable of performing his duties as partner ;

(c) that a partner, other than the partner suing, is guilty of conduct which is likely to affect prejudicially the carrying on of the business, regard being had to the nature of the business ;

(d) that a partner, other than the partner suing, wilfully or persistently commits breach of agreements relating to the management of the affairs of the firm or the conduct of its business, or otherwise so conducts himself in matters relating to the business that it is not reasonably practicable for the other partners to carry on the business in partnership with him ;

(e) that a partner, other than the partner suing, has in any

12. Banarsi Das v. Kanshi Ram, A. I. R. 1963 S. C. 1165, at pp. 1169-70.

13. McLeod v. Dowling, 43 T. L. R. 655.

way transferred the whole of his interest in the firm to a third party, or has allowed his share to be charged under the provisions of Rule 49 of Order XXI of the First Schedule to the Code of Civil Procedure, 1908, or has allowed it to be sold in the recovery of arrears of land revenue or of any dues recoverable as arrears of land revenue due by the partner ;

(f) that the business of the firm cannot be carried on save at a loss ; or

(g) on any other ground which renders it just and equitable that the firm should be dissolved.

Comments

This section deals with the dissolution of a firm by the court. The question of dissolution by the court arises when all the partners do not want the dissolution. The partner or partners who want dissolution can file a suit and the other partners may contest the same. A suit for dissolution can be filed only when one or the other ground mentioned in section 44 is there. Even when there is a valid ground for filing the suit for dissolution and a partner accordingly files the suit, the court is not bound to decree dissolution as this section clearly provides that "At the suit of a partner, the Court *may* dissolve the firm."

The grounds which justify the filing of suit by a partner for the dissolution of the firm are as under :

(1) Unsoundness of mind.—When a partner becomes of unsound mind neither he can protect his own interest nor can he perform his duties as a partner. Therefore, when a partner becomes of unsound mind a suit for the dissolution of the firm can be filed. Such a suit may be filed either on behalf of the partner who has become of unsound mind, or by any other partner.

(2) Permanent incapacity to perform duties.—When a partner becomes permanently incapable of performing his duties as a partner that is a good ground for applying to the court for the dissolution of the firm. When the incapacity is not permanent the court would not grant relief. In *Whitwell* v. *Arthur*[14] one partner filed a suit for the dissolution of the firm when the other suffered from the paralytic attack and was thereby incapacitated from his duties as a partner. It was found from medical evidence that the capacity was not likely to be permanent as the defendant's health was improving. The court did not grant the dissolution of the firm.

When a partner becomes permanently incapable of performing his duties, the suit for dissolution can only be filed by any other partner, and not by the partner who suffers from the incapacity.

14. 35 Beav. 140.

(3) Conduct injurious to the partnership business.—When a partner is guilty of conduct which is likely to effect prejudicially the carrying on the business of the firm, the court may dissolve the firm on that ground. Misconduct need not be with regard to the partnership business, but the conduct should be such as would prejudicially affect the partnership business. The acts of adultery by a partner in a firm of bankers has been considered to be no ground for seeking dissolution by the other partners but that may be so if it is a firm of medical practitioners.[15] Conviction for a breach of trust,[16] or the adultery by one partner with another partner's wife[17] are good grounds for the dissolution of the firm.

The suit for dissolution can not be brought by the guilty partner, but by a partner other than one who is guilty of conduct discussed above.

(4) Persistent breach of partnership agreements.—When a partner wilfully and persistently commits breach of agreements relating to the management of the affairs of the firm, or so conducts himself in matters relating to the firm's business that it is not reasonably practicable for the other partners to carry on the business in partnership with him, a suit for the dissolution of the firm may be filed. In *Harrison* v. *Tennant*[18], one of the partners in a firm of solicitors ignored the other two partners and declined to settle their disputes by mutual consultation. It was held that the conduct of one of the partners being destructive of mutual confidence, which could not be restored, was a valid ground for the dissolution of the firm. Similarly, when due to frequent quarrels there is no hope of mutual co-operation[19], or a partner prepares false accounts and enters in the accounts smaller sums of money than actually received from the customers[20], or when a partner refuses to render accounts and takes away the books of accounts of the firm[21], or a partner misuses partnership funds for paying personal debts[22], the court may order dissolution.

The suit for dissolution in this case also cannot be filed by the guilty partner. Only a partner other than him may file a suit.

(5) Transfer of the whole of a partner's interest.—When a partner has transferred the whole of his interest in the firm to a third party, it can be a ground on which the court may dissolve

15. Snow v. Milford, (1868) 18 L. T. 142.
16. Essel v. Hayward, 30 Beav, 158; Also see Carmichael v. Evans, (1904) 1 Ch. 486.
17. Abbot v. Crump, (1870) 5 Beng. L. R. 109.
18. (1856) 21 Beav. 482.
19. Baxter v. West, 1 Dr. and Sm. 273 : 172 R. R. 64 ; Watney v. Wells, 30 Beav. 132 R. R. 182.
20. Cheeseman v. Price, (1856) 35 Beav. 142.
21. Vali Venkataswami v. Venkataswami, A. I. R. 1954 Mad. 9.
22. Smith v. Jeyes, (1941) 4 Beav. 503.

the firm. Similar would be the position when a partner has allowed his share to be charged under the provisions of the Civil Procedure Code, or has allowed it to be sold in the recovery of the arrears of land revenue or any dues as arrears of land revenue. It is necessary that the transfer must be of the whole of the partner's interest rather than merely a part of it. For dissolution in this case also the suit can be filed only by a partner other than the one whose interest has been transferred.

(6) **When the business can be carried on only at a loss.**—The object of every partnership is to make profits. If it appers that the business of the firm cannot be carried on except at a loss, any of the partners may apply to the court for the dissolution of the firm.[23]

(7) **When dissolution is just and equitable.**—The court has been given very wide power of dissolution. Apart from ordering the dissolution of the firm on the grounds stated above the court has been vested with the power of dissolving the firm on any other ground which renders it just and equitable that the firm should be dissolved. In *Abbot* v. *Crump*,[24] adultery by one partner with another partner's wife was held to be a good ground for the dissolution of the firm by the court.

45. Liability for acts of partners done after dissolution.—(1) Notwithstanding the dissolution of a firm, the partners continue to be liable as such to third parties for any act done by any of them which would have been an act of firm if done before the dissolution, until public notice is given of the dissolution :

Provided that the estate of a partner who dies, or who is adjudicated an insolvent, or of a partner who, not having been known to the person dealing with the firm to be a partner, retires from, is not liable under this section for acts done after the date on which he ceases to be a partner.

(a) Notices under sub-section (1) may be given by any partner.

Comments

Liability after dissolution

It has been noted above that when a partner ceases to be a partner by retirement or expulsion his liability, for the acts of the firm done after such retirement or expulsion, towards the third parties can still arise until a public notice of the fact is given.[25] This section incorporates a similar provision. Inspite of dissolution the liability of the partners for an act of the firm can arise as before until a public notice of the dissolution of the firm

23. Jennings v. Baddeley, (1856) 3 K. & J. 78 : 112 R. R. 42.
24. (1870) 5 Beng. L. R. 109.
25. Secs. 32 (3) and 33 (2).

is given. The reason for such a liability is that the third party, who knew of their partnership and of mutual agency, can continue to presume that the mutual agency between such persons continues until public notice of the end of that mutual agency is given.

In the following cases the liability of the partners does not arise after the date of dissolution even though no public notice of dissolution of the firm has been given.

(1) When a partner dies, his estate is not liable for the acts done after his death. No public notice is needed on the death of a partner because the fact of death of a partner is deemed to have come to the knowledge of the persons who knew him.

(2) The position of a partner who is adjudicated insolvent is similar to that of a deceased partner. In his case also no public notice is needed and his estate is not liable for the acts done after the dissolution of the firm.

(3) No public notice is needed in case of a retired partner who was not known to be a partner to the third party dealing with the firm. This provision is similar to the one contained in proviso to section 32 (3).

In *Juggilal Kamalapat* v. *Sew Chand Bagree*[26], a firm consisting of three partners A, B and C was established in 1933 in the firm name "Messers Sew Chand Bagree", and it was got registered in the same firm name and with the same partners, i. e., A, B and C. In 1945 the firm was dissolved and thereafter only A carried on the business. In 1948, while the business was carried on by A alone, he made a contract in the name of the firm, i. e., Messers Sew Chand Bagree with the appellants, Messers Juggilal Kamalapat. The appellants, who obtained a decree against the firm, wanted to make A, B and C liable. It was contended that public notice of dissolution had not been given and, therefore, B and C were also liable alongwith A. It was established that when the appellants entered into the contract, B and C were not known to be partners to them. They came to know of the fact that B and C were also at one time partners only after the dispute in respect of the contract had arisen. It was held that B and C could not be made liable as they were not known to be partners to the appellants when the contract in question was made and, therefore, they were protected under the proviso to section 45.

46. Right of partners to have business wound up after dissolution.—On the dissolution of a firm every partner or his representative is entitled, as against all the other partners or their representatives, to have the property of the firm applied in payment of

26. A.I.R., 1960 Cal. 463 ; Also see Tower Cabinet Co. v. Ingram, (1949) 2 K. B. 397.

the debts and liabilities of the firm, and to have the surplus distributed among the partners or their representatives according to their rights.

Comments

By dissolution the relation of partnership between various partners comes to an end. Thereafter there has to be winding up of the affairs of the firm. That includes realisation of the assets of the firm and also paying off all the liabilities, and then to distribute the surplus, if any, amongst the partners. On the dissolution of a firm every partner or his representative has a right to see that the affairs of the firm are properly wound up. He has a right to have the property of the firm applied in payment of the debts and liabilities of the firm. If, on the dissolution of the firm, the debts and liabilities of the firm remain unsatisfied, each partner continues to be exposed to the risk of being made jointly and severally liable for the same towards third parties. To avoid any such situation every partner or his representative has been made entitled, as against all the other partners or their representatives, to have the property of the firm applied in payment of the debts and liabilities of the firm, and then there is distribution of the surplus amonst the partners or their representatives according to their rights. The right contained in this section is also known as the partner's general lien over the surplus assets of the firm.[27] The lien is not on any specific property but it is only in the form of a claim against the surplus assets on realisation.

47. Continuing authority of partners for purposes of winding up. – After the dissolution of a firm the authority of each partner to bind the firm, and other mutul rights and obligations of the partners, continue notwithstanding the dissolution, so far as may be necessary to wind up the affairs of the firm and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise :

Provided that the firm is in no case bound by the acts of a partner who has been adjudicated insolvent ; but this proviso does not affect the liability of any person who has after the adjudication represented himself or knowingly permitted himself to be represented as partner of the insolvent.

Comments

Authority of partners during winding up

By dissolution of the firm the partners cease to be partners with one another and, therefore, the mutual agency which existed between them to act on behalf of each other to carry on the business of the firm also comes to an end. But after dissolution the

27. Re Bourne, (1906) 2 Ch. 427, 432, per Romer, l. J.

winding up of the affairs of the firm has got to be done. For example, the contracts already entered into have to be performed, amount due to the creditors has got to be paid, amount due from the firm's debtors has got to be realised, joint property has got to be disposed off and converted into cash. Moreover, capital contributed by the partners has to be refunded. Sometimes for realising the debts suit may have to be filed. For doing any act which is necessary to wind up the affairs of the firm the mutual agency between the partners still exists. A partner cannot place fresh order for the goods, but he can take delivery of the goods ordered before dissolution and pay for them. This section, therefore, declares that notwithstanding the dissolution of the firm, the mutual rights and obligations of the partners and the authority of each partner to bind the firm continues so far as that may be necessary to wind up the affairs of the firm and also to complete those transactions which had been begun but remained unfinished at the time of the dissolution.

When a partner dies and the partnership comes to an end, it is not only the right, but the duty, of a surviving partner to realise the assests for the purpose of winding up the partnership affairs including the payment of partnership debts.[28]

The authority under winding up does not empower a partner to create a 'novatio' in respect of a debt owing to the firm. That is not recovering a debt, but really continuing through somebody else as the debtor. His partners may previously consent to it or subsequently ratify or acquiesce in it ; otherwise it is not binding upon them.[29]

The following observations in *Motiram Chimanram* v. *Sarup Chand Pirthi Raj*[30] explain the authority of a partner during winding up :

"It is therefore clear that though the dissolution of a firm causes a dissolution of the partnership between the partners, the partnership still subsists, but merely for the purpose of winding up its business and adjusting the rights of the partners *inter se*, and for this purpose the authority of the partners to bind the firm, and all their mutual rights and obligations, continue notwithstanding the dissolution. The power of each partner however extends only so far as it is necessary to wind up the affairs of the firm and to complete transactions already begun. It has been held that if a debt is owing to the firm, payment by the debtor to any one of the partners extinguishes the claim of all the partners and discharges the debtor, even though a particular partner or a third person is

28. Bourne v. Bourne, (1906) 2 Ch. 427, at p. 431. This statement was quoted with approval by their Lordships of the Privy Council in Babu v. Official Assignee of Madras, 38 Cal W. N. 1018 : A. I. R. 1934 P. C. 138. Also see Gajanand v. Sardar Mal. A. I. R. 1961 Raj. 223.

29. Motilal v. Sarup Chand (1936) 38 Bom. L. R. 1058, at p. 1064.

30. A. I. R. (1937) Bom. 81 at p. 83 : (1936) 38 Bom. L. R. 7058, 1061.

appointed to collect the debts owing to the firm, and whether the debtor is aware of such appointment or not. Any partner of a dissolved firm can therefore recover payment of a debt due to the firm. He can effectually release the debtor and also give a valid receipt for the debt. But neither the release nor the receipt will be binding on his co-partners if the receipt is given, or the releasing partner acts, in fraud of his co-partners and in collusion with the debtor."

In *Butchart* v. *Dresser*,[31] A and B, the two partners agreed to buy certain shares. The payment for those shares had not been made and the firm was dissolved. A pledged those shares to borrow money from the firm's bankers to pay for those shares. B contended that the pledging of shares was not valid as the firm had been dissolved and the bankers knew about the dissolution.

It was held that the pledging of the shares was necessary to raise fund for completing the contract previously made by the firm. It was not beyond the authority of the partner doing so and as such the other partner was bound by the transaction.

Proviso to sec. 47 states that the rule of the existence of mutual agency between the partners for the purpose of winding up does not apply in the case of an insolvent partner, and the firm is in no case bound by the acts of a partner who has been adjudicated insolvent. However, any person who has after the adjudication represented himself or knowingly permitted himself to be represented as a partner with the insolvent, can be made liable as a partner.

48. Mode of settlement of accounts between partners.—In settling the accounts of a firm after dissolution, the following rules shall, subject to agreement by the partners, be observed :—

(a) Losses, including deficiencies of capital, shall be paid first out of profit, next out of capital, and, lastly, if necessary, by the partners individually in the proportions in which they were entitled to share profits.

(b) The assets of the firm, including any sums contributed by the partners to make up deficiencies of capital, shall be applied in the following manner and order :—

(i) in paying the debts of the firm to third parties ;

(ii) in paying to each partner rateably what is due to him from the firm for advances as distinguished from capital ;

31. 10 Hare 453 : 102 R. R. 269 ; Also see Re Bourne, (1906) 1 Ch. 113 ; (1906) 2 Ch. 427.

(iii) in paying to each partner rateably what is due to him on account of capital ; and

(iv) the residue, if any, shall be divided among the partners in the proportions in which they were entitled to share profits.

Comments

This section mentions the mode of the settlement of accounts between the partners on the dissolution of the firm. The rules as stated in this section are applicable when the partners have not made an agreement on these points. The rules which emerge from this section are as under :

1. Losses are to be shared equally. The deficiency in capital is also to be treated like an ordinary loss and the partners are to bear that loss in the same proportion in which they were sharing profits and losses. For example, A, B and C contributed a capital of Rs. 25,000/-, Rs. 20,000/- and R. 5,000/- respectively, but they share the profits and losses equally. The total capital is Rs. 50,000/-. If the assets realise Rs. 20,000/- only, there is deficiency of capital to the extent of Rs. 30,000/-. Each partner is bound to contribute Rs. 10,000/- for the loss. After the partners make good this deficiency, total amount of Rs. 50,000/- will be available and that will be utilised for the return of capital contributed by the partners.

In *Nowell* v. *Nowell*,[32] A and B had contributed unequal amount—£ 1929 and £ 29 respectively—towards the capital. They had agreed to share the profits and the losses equally. A deficiency of £ 500 in capital having arisen, it was held that the same was to be shared equally between A and B.

If one or more partners become insolvent and they are not able to contribute their share of the loss, the solvent partners are not bound to contribute for the share of the insolvent partners.[33]

2. On the dissolution of the firm if the amount available is sufficient to meet all the claims of the partners and the third parties there is no problem. If, on the other hand, the amount available is insufficient the payments are to be made in a certain order. Sub-sec. (2) says that the amount available is to be utilised for making payments in the following order :

(1) Making payments for the debts of the firm to the third parties ;

(2) If some partners have given advance over and above

32. (1869) L. R. 7 Equity cases 538.
33. Garner v. Murray, (1904) 1 Ch. 57 : (1904) 73 L. J. Ch. 66. Also see Hira Nand v. Dula Ram, A. I. R. 1933 Lahore 1022.

the capital, then the amount is to be utilised in making payment to each one of them rateably ;

(3) Making payment to each partner rateably what is due to him on account of capital ;

(4) The residue, if any, is deemed to be profit and the same is to be divided among the partners in the proportions in which they were entitled to share profits.

49. Payment of firm debts and of separate debts.— Where there are joint debts due from the firm, and also separate debts due from any partner, the property of the firm shall be applied in the first instance in payment of the debts of the firm, and, if there is any surplus, then the share of each partner shall be applied in payment of his separate debts or paid to him. The separate property of any partner shall be applied first in the payment of his separate debts, and the surplus (if any) in the payment of the debts of the firm.

Comments

Sometimes there may be joint debts due from the firm and separate debts due from a partner and the property of the firm may not be enough to satisfy them all. The question arises as to which debts are to be satisfied out of the firm's property. A similar question also arises when there is a claim against the separate property of a partner of the joint debts and the separate debts. This section incorporates the following rules :

1. The property of the firm shall be applied in the first instance in payment of the debts of the firm, and if there is any surplus, then the share of each partner shall be applied in payment of his separate debts or paid to him. It is a corollary to section 46 of the Act, which provides that a partner has a right to get the joint property of the firm applied in payment of the debts and liabilities of the firm and then the distribution of the surplus amongst the partners or their representatives.

2. The separate property of any partner shall be applied first in the payment of his separate debts, and the surplus, if any, may be utilised in the payments of the debts of the firm.

50. Personal profits earned after dissolution.—Subject to contract between the partners, the provisions of clause (a) of section 16 shall apply to transactions by any surviving partner or by the representatives of a deceased partner, undertaken after the firm is dissolved on account of the death of a partner and before its affairs have been completely wound up :

Provided that where any partner or his representative has bought the goodwill of the firm, nothing in this section shall affect his right to use the firm name.

Comments

We have already noted section 16 (a), according to which no partner can make a personal gain out of any transaction of the firm or the use of the name, property or business connection of the firm. If he makes any such gain he shall account for that to the firm.[34] A similar duty is contained in section 50 on the dissolution of a firm by the death of a partner. Therefore, a partner making personal profits after dissolution and before winding up has to account for those profits. The reason is that until there is winding up all the partners continue to be the owners of the firm and also the joint property and, therefore, no partner can gain any personal advantage by the use thereof for his personal gain.

Section 53 of the Act empowers the partners or their representatives to restrain any other partner or his representative from carrying on the similar business in the firm name or from using any of the property of the firm for his own benefit, until the affairs of the firm have been completely wound up.

If, after the dissolution of the firm, any partner or his representative buys the goodwill of the firm he can make use of the firm name and he shall not be subject to the liability discussed above.

51. Return of premium on premature dissolution.—Where a partner has paid a premium on entering into partnership for a fixed term, and the firm is dissolved before the expiration of that term otherwise than by the death of partner, he shall be entitled to repayment of the premium or of such part thereof as may be reasonable, regard being had to the terms upon which he became a partner and to the length of time during which he was a partner, unless—

(a) the dissolution is mainly due to his own misconduct, or

(b) the dissolution is in pursuance of an agreement containing no provision for the return of the premium or any part of it.

Comments

When a person is admitted as a partner to an already established business he has generally to pay some consideration, known as premium to secure the right of becoming and remaining a partner in the firm. The premium goes to the pockets of those persons who were already carrying on the business.

If a person pays premium to become a partner for a certain specified period, but the partnership ends before the expiry of that term, he is entitled to refund of premium. How much premium is to be refunded will depend on the terms on which he became a

34. Aas v. Benham, (1891) 2 Ch. 254 ; Bentley v. Craven, (1853) 18 Bea v. 75 : 104 R. R. 373.

partner and the length of time during which he was a partner. Regard being had to these things, whatever is reasonable will be returned.

It may be noted that the return of premium or part thereof is allowed when a person became a partner for a fixed term, and there is dissolution of partnership before the expiry of that term. Therefore, there is no question of return of premium if the partnership was at will. If an agreement between the partners in a partnership at will provides for the refund of premium, or the partner receiving the premium is acting fraudulently, premium may be refunded even in a partnership at will. In a partnership at will, a partner cannot dissolve the partnership soon after receiving the premium and then retain the premium.[35]

In the following exceptional cases even though the partnership was for a fixed term there will be no refund of premium on its premature dissolution :

1. When the dissolution of partnership occurs by the death of a partner, there is to be no refund of premium unless there is an express stipulation in a contract between the partners.[36] But if a person knowing himself to be in a dangerous state of health and suffering from a fatal disease conceals this fact and receives the premium, it is a case of fraud and the premium will have to be refunded if there is premature dissolution due to the death of such partner.[37]

2. When the dissolution of the firm is mainly due to the misconduct of the partner who paid the premium, he is not entitled to any refund. The reason is that a guilty person should not take advantage of his own wrong. But if the person receiving the premium is guilty,[38] or both the partners, *i. e.*, the one receiving and the one paying the premium are guilty,[39] or where none of them is guilty,[40] the court will order the refund of premium.

3. When the dissolution is by an agreement but the agreement does contain any provision for the return of premium or any part thereof, nothing is to be returned. In such a case the inference is that if the partners while agreeing to the dissolution are silent about the return of the premium, they do not intend any return.

52. Rights where partnership contract is rescinded for fraud or misrepresentation.—Where a contract creating partnership is rescinded on the ground of the fraud or misrepresentation of any

35. Featherstonhaugh v. Turner, 25 Beav. 382 ; Tattersall v. Groote, 2 Bos. & P. 134.
36. Whineup v. Hughes, (1871) L. R. 6 C. P. 78 ; Ferns v. Carr, (1885) 28 Ch. D 409.
37. Mackenna v. Parkes, (1866) 36 L. J. Ch. 366.
38. Bullock v. Crockett, 3 Giff. 507; Rooke v. Nisbet, 50 L. J. Ch. 588.
39. Astle v Wright, 23 Beav. 77; Pease v. Hewitt, 31 Beav. 22.
40. Atwood v. Mande, 3 Ch. 369.

of the parties thereto, the party entitled to rescind is, without prejudice to any other right, entitled—

(a) to a lien on, or a right of retention of, the surplus of the assets of the firm remaining after the debts of the firm have been paid, for any sum paid by him for the purchase of a share in the firm and for any capital contributed by him ;

(b) to rank as a creditor of the firm in respect of any payment made by him towards the debts of the firm ; and

(c) to be indemnified by the partner or partners guilty of the fraud or misrepresentation against all the debts of the firm.

Comments

When a person becomes a partner he invests capital, he may sometimes give advance over and above the capital, he may have paid premium for becoming a partner. During partnership he may make payments on behalf of the firm. Apart from that for all acts of the firm done while he is a partner he incurs joint and several liability towards third parties. When a partner rescinds the contract of partnership and leaves the firm on the ground of fraud or misrepresentation of the other partners all his interests have got to be protected. This section grants necessary protection to the partner thus rescinding the contract. Apart from the right of avoiding the contract on ground of fraud or misrepresentation which is available to him according to section 19 of the Indian Contract Act, and also a right to claim damages for fraud under the law of torts, he is entitled to the following rights :

1. He has a right of lien on, or a right of retention of, the surplus assets so far as it may be necessary to return the capital contributed by him and also for any other sum which he may have paid for the purchase of share in the firm, *i. e.*, payment of premium made by him.

2. He is to rank as a creditor of the firm in respect of any payment made by him towards the debts of the firm. Being treated as a creditor means priority in the payment of that amount, as is stated in sections 48 (3) (i).

3. He has also a right to claim indemnity from the partners guilty of fraud or mirespresentation against all the debts of the firm.

53. Right to restrain from use of firm name or firm property.—After a firm is dissolved every partner or his representative may, in the absence of a contract between the partners to the contrary, restrain any other partner or his representative from

carrying on a similar business in the firm name or from using any of the property of the firm for his own benefit, until the affairs of the firm have been completely wound up :

Provided that where any partner or his representative has bought the goodwill of the firm, nothing in this section shall affect his right to use the firm name.

Comments

Not only during the continuance of the firm but even after dissolution a partner cannot use the firm's property or firm's name for personal benefit, until the affairs of the firm have been completely wound up. This section empowers a partner is his representative to restrain any other partner or his representative from carrying on a similar business in the firm name or from using any of the property of the firm for his own benefit, until the affairs of the firm have been completely wound up. This rule is subject to a contract between the partners to the contrary. However, where a partner or his representative has bought the goodwill of the firm he can use the firm name.

54. Agreements in restraint of trade.—Partners may, upon or in anticipation of the dissolution of the firm, make an agreement that some or all of them will not carry on a business to that of the firm within a specified period or within specified local limits ; and notwithstanding anything contained in section 27 of the Indian Contract Act, 1872, such agreement shall be valid if the restrictions imposed are reasonable.

Comments

On the dissolution of the firm one of the partners sometimes may purchase the business, or sometimes the business may be sold to a third party. The partners may, upon or in anticipation of the dissolution of the firm, make an agreement that some or all of them will not carry on a business similar to that of the firm within specified period or within specified local limits. Notwithstanding the rule contained in sec. 27 of the Contract Act that an agreement in restraint of trade is void, such an agreement is valid if the restrictions which are imposed are reasonable.

55. Sale of goodwill after dissolution.—(1) In settling the accounts of a firm after dissolution, the goodwill shall, subject to contract between the partners, be included in the assets, and it may be sold either separately or alongwith other property of the firm.

(2) Rights of buyer and seller of goodwill.—Where the goodwill of a firm is sold after dissolution, a partner may carry on a business competing with that of the buyer and he may advertise such business, but, subject to agreement between him and the buyer, he may not—

(a) use the firm name,

(b) represent himself as carrying on the business of the fiirm, or

(c) solicit the custom of persons who were dealing with the firm before its dissolution.

(3) **Agreements in restraint of trade.**—Any partner may, upon the sale of the goodwill of a firm, make an agreement with the buyer that such partner will not carry on any business similar to that of the firm within a specified period or within specified local limits, and, notwithstanding anything contained in section 27 of Indian Contract Act, 1872, such agreement shall be valid if the restrictions imposed are reasonable.

Comments

Goodwill is an asset of the firm, and, therefore, on the dissolution of the firm, it may be sold either separately or alongwith other assets of the firm.

When the goodwill of the firm has been sold after dissolution, unless the buyer of the goodwill imposes some restrictions, the seller of the goodwill, that is, the partners of the firm may carry on a business competing with that of the buyer and may also advertise such business. However, the carrying on the other business is subject to the following restrictions :

1. He cannot use the name of the firm. On the sale of goodwill, it is only the buyer of the goodwill who can use the name of the firm.

2. He cannot ropresent himself to be carrying on the business of the firm. In *Hookham* v. *Pottage*[41], on the dissolution of the firm, "Hookham and Pottage", by a decree of the court it was decided that the goodwill should belong to Hookham. Hookham now continued the business, under the name "Hookham & Co". The other partner, Pottage also started a business in the same area and named his shop as, "Pottage from Hookham and Pottage." It was held that use of the firm name like that would create an impression that he was connected with the old firm and, therefore, Hookham was entitled to obtain injunction restraining Pottage from using the firm name like that.

3. He cannot solicit the custom of persons who had been dealing with the firm before dissolution. It means that he cannot canvass for the customers being diverted from the old business towards him. If they themselves come to him he may attend to them, but it will be wrong if he approaches them with an idea to persuade them for being diverted towards himself. In *Trego* v. *Hunt*,[42] Trego, who was varnish and japan manufacturer took

41. (1872) 8 Ch. 91.
42. (1896) A. C. 7.

Hunt into partnership on the condition that the goodwill of the business will be the sole property of Trego. Trego died and then Hunt made an agreement with Mrs. Trego, who succeeded Mr. Trego, that he would continue as partner for 7 years and the goodwill will remain the sole property of Mrs. Trego. When approximately one year of partnership was left, it was discovered by Mrs. Trego that Hunt had employed a clerk of the firm to prepare a list of the firm's customers, after the office hours. His object obviously was to approach them after retirement to convass them for becoming his customers. It was held that Mrs. Trego was entitled to obtain an injunction to restrain Hunt from making such copies of the lists of the firm's customers.

If the buyer of the goodwill wants further protection of his interest he may make an agreement with the seller of the goodwill, *i. e.*, the partners of the firm stipulating that any such partner shall not carry on any business similar to that of the firm within a specified period or within specified local limits. Notwithstanding the rule contained in sec. 27, Indian Contract Act, that an agreement in restraint of trade is void, such an agreement will be valid if the restrictions imposed are reasonable.

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CHAPTER VII

REGISTRATION OF FIRMS

Introduction

This chapter deals with the registration of partnership firms. The Act does not make the registration of partnership firms compulsory in India nor does the Act impose any penalties for non-registration as are imposed in England under the Registration of Business Names Act, 1916. However, certain disabilities are provided in section 69 of the Act for unregistered firms and their partners. The procedure of registration is very simple and the disadvantages of non-registration are so great that generally the partners of a firm would like to get the firm registered.

Sections 58 and 59 deal with the procedure for the registration of a firm. The registration of a firm may be effected by submitting to the Registrar of Firms a statement in the prescribed form and accompanied by the prescribed fee. The Registrars of Firms are appointed by the State Government and State Government is also to define the areas within which the Registrars shall exercise their powers and perform their duties. (Sec. 57). The statement for registration must mention (i) the firm name, (ii) the place or principal place of business of the firm, (iii) the names of any other places where the firm carries on business, (iv) the date when each partner joined the firm, (v) the names and permanent addresses of the partners, and (vi) the duration of the firm. (Sec. 58). When the Registrar is satisfied that the abovementioned requirements have been complied with, he shall record an entry of the statement in the register called the Register of Firms, and shall file the statement. (Sec. 59).

The object of registration is to protect the interests of those who may be dealing with the firm so that the necessary particulars concerning a firm could be available to them. The Register of Firms shall be open to inspection by any person on payment of the prescribed fee. Moreover, all statements, notices and intimations filed by a registered firm or its partners shall also open to inspection, subject to such conditions and on payment of such fee as may be prescribed. (Sec. 66). Any person on payment of the prescribed fee shall also be entitled to have a copy, duly certified by the Registrar, of any entry or portion thereof in the Register of Firms. The partners should be careful while sending any statement, intimation or notice to the Registrar of Firms. They must send correct information and if subsequently there is any change the information of the same must also be sent at the earliest. It has been provided by sec. 68 (1) that the documents filed with the Registrar, on the basis of which he prepares his record

and the Register of Firms, shall be conclusive proof of the facts contained therein as against any person by whom or on whose behalf such document was signed. Supposing a partner of a registered firm retires but no notice of the change is given to the Registrar, the existence of the name of the partner in the record of the Registrar shall be a conclusive proof as against such a partner and he can be made liable to the third parties as if he were still a partner in the partnership firm. A third party, therefore, can take benefit of what is there in the records with the Registrar. A certified copy of an entry relating to a firm in the Register of Firms may be produced in proof of the fact of the registration of such firm, and of the contents of any statement, intimation of notice recorded or noted therein. [Sec. 68 (2)].

Changes after registration

Various changes may occur after the firm has been registered. So that the Registrar can also record the change in respect of a particular firm necessary information may be given to the Registrar. For example, there may be alteration in the firm name or in the location of the principal place of business of a registered firm, or there may be closing or opening of some branches, or there may be change in the names and addresses of the partners. In all scuh cases intimation about the alteration may be sent to the Registrar, who shall file it alongwith the statement relating to the firm filed under sec. 59. (Ss. 60, 61, 62). Similarly, a change may occur in the constitution of the firm, for instance, some new partner may join or an existing partner may retire or there may be the dissolution of a firm. Upon such a change also notice of the fact may be given to the Registrar. It has already been noted that according to sections 32 (2) and 45, when a partner retires or is expelled or the firm is dissolved a public notice of the same has to be given, otherwise the liability of all the persons who were partners but have now ceased to be so, still continues to be there for the acts of each other. In the case of a registered firm public notice includes notice to the Registrar of Firms also under sec. 63. Similarly, a minor who had been admitted to the benefits of partnership, on attaining majority, should elect as to whether he becomes a partner or not and give a public notice of the same. Public notice here also means a notice to the Registrar in case the firm is a registered one.

In case the entry in the Register of Firms relating to any particular firm is not in confirmity with the documents filed with the Registrar, the Registrar has a power at all times to rectify any mistake in the Register to bring it in confirmity with the documents filed. (Sec. 64). According to sec. 65 a Court can also order an amendment in the Register of Firms. A Court deciding any matter relating to a registered firm may direct that the Registrar shall make any amendment in the entry in the Register of Firms relating to such firm which is consequential upon its deci-

sion ; and the Registrar shall amend the entry accordingly.

Effects of non-registration

It has already been noted that the registration of a partnership firm is not compulsory in India, nor are any penalties imposed if a firms does not get itself registered. Section 69 of the Act provides certain disabilities for such firms and their partners who do not get themselves registered. In view of those disabilities generally the partners of a firm would prefer to get the firm registered. Section 69 bars certain suits and proceedings in respect of an unregistered firm. The main provisions of section 69 are as under :

(1) Institution of suits between the partners *inter se* or between the partners and the firm for the purpose of enforcing rights arising from a contract or conferred by this Act is barred unless the firm is registered and the person suing has been shown in the Register of Firms as a partner.

(2) Institution of suits by a firm or its partners against third parties to enforce a right arising from a contract is barred unless the firm is registered and the persons suing have been shown in the Register of Firms as partners. It may be noted that this disability is only against an unregistered firm or its partners and not against the third party. A third party can file a suit against a registered or an unregistered firm in the same way.

(3) An unregistered firm is also barred from claiming a set-off which may be in the nature of a counter-claim. There is also a bar against other proceedings by an unregistered firm. In *Jagdish Chand Gupta* v. *Kajaria Traders* the Supreme Court has held that other proceedings include arbitration proceedings also and, therefore, the partner of an unregistered firm cannot bring an action in a court of law to enforce an arbitration agreement. Similarly, an action by an unregistered firm against the landlord of the firm for the reduction of the rent arising out of the contract of tenancy is not maintainable.

(4) The abovestated disabilities do not apply in the following cases :

(i) A suit can be brought by an unregistered firm or its partners for the dissolution of the firm or for the accounts of the dissolved firm. After the firm is dissolved a suit can also lie for the realisation of the property of the dissolved firm.

(ii) Even if the firm is unregistered an official assignee, receiver or the court can file a suit to realise the property of an insolvont partner.

(iii) An unregistered firm or its partners can sue or claim set-off where the subject matter does not exceed Rs. 100.

(iv) If the Act or the provisions of this Chapter are not to be applicable in a certain area (see Sec. 56), the disabilities mentioned in sec. 69 obviously do not apply to unregistered firms in that area.

56. Power to exempt from application of this Chapter.— The State Government of any State may, by notification in the Official Gazette, direct that the provisions of this chapter shall not apply to that State or to any part thereof specified in the notification.

Comments

This section empowers the State Governments to exempt the State or any part thereof from the application of the provisions of this chapter by issuing a notification to that effect.

57. Appointment of Registrars.—(1) The State Government may appoint Registrars of Firms for the purposes of this Act, and may define the areas within which they shall exercise their powers and perform their duties.

(2) Every Registrar shall be deemed to be a public servant within the meaning of section 21 of the Indian Penal Code.

Comments

Sub-section (1) empowers the State Governments to appoint Registrars of Firms and also to define the areas of jurisdiction for the various Registrars thus appointed for the purpose of exercise of their powers and performance of their duties in connection with the Registration of Firms.

Sub-sec. (2) declares that every Registrar shall be deemed to be a public servant within the meaning of sec. 21, I. P. C.

58. Application for Registration.—(1) The registration of a firm may be effected at any time by sending by post or delivering to the Registrar of the area in which any place of business of the firm is situated or proposed to be situated, a statement in the prescribed from and accompanied by the prescribed fee, stating—

(a) the firm name,

(b) the place or principal place of business of the firm,

(c) the names of any other places where the firm carries on business,

(d) the date when each partner joined the firm,

(e) the names in full and permanent addresses of the partners, and

(f) the duration of the firm.

The statement shall be signed by all the partners, or by their agents specially anthorised in this behalf.

(2) Each person signing the statement shall also verify it In the manner prescribed.

(3) A firm name shall not contain any of the following words, namely :—

"Crown," "Emperor," "Empress," "Empire," "Imperial," "King," "Queen," "Royal," or words expressing or implying the sanction, approval or patronage of Government except when the State Government signifies its consent to the use of such words as part of the firm name by order in writing.

Comments

Sub-sec. (1) prescribes the mode of registration. An application on the form, which may be prescribed by the State Government under Sec. 71 (2) (a) of the Act, has to be made and the same is to be accompanied by the prescribed fee. Under sec. 71 (1) the State Government has been authorised to make rules prescribing the fees, but that shall not exceed the maximum fees specified in Schedule I, which is Rs. 3/- for the purpose. Particulars mentioned in sub-sec. (1) have got to be included in the application. The statement shall be signed by all the partners, or by their agents specially authorised in this behalf.

According to sub-sec. (2) each person signing the statement shall also verify it in the manner prescribed.

The provision that "registration of a firm may be effected at any time" by following the abovestated procedure, clearly shows that the registration is optional in India and there are no penalties for non-registration as are there in England under the Registration of Business Names Act, 1916. Moreover, if the partners choose to get the firm registered, that may be done *at any time*, and not necessarily at the time of the formation of the firm. If a firm remains unregistered the firm and its partners would suffer from the disabilities mentioned in sec. 69. If the firm is registered but some partner or partners have not been registered, *e. g.*, they join after the registration of the firm, such partners who are not registered, will be subject to the disabilities mentioned in sec. 69 (1) and (2).[1]

Sub-sec. (3) imposes restrictions on the firm name, and the firm name must not contain any of the words stated in the sub-section.

59. **Registration.**—When the Registrar is satisfied that the provisions of section 58 have been duly complied with he shall record an entry of the statement in a register called the Register of Firms, and shall file the statement.

1. Chiman Lal v. Firm New India Traders, A. I. R. 1962 Patna 125.

Comments

This section imposes a duty on the Registrar to register the firm. When he is satisfied that the provisions of seetion 58 have been complied with he is to record an entry in the Register of Firms and file the statement submitted by the partners under the preceding section.

60. Recording of alterations in firm name and principal place of business.—(1) When an alteration is made in the firm name or in the location of the principal place of business of a registered firm, a statement may be sent to the Registrar accompanied by the preseribed fee, specifying the alteration, and signed and verified in the manner required under section 58.

(2) When the Registrar is satisfied that the provisions of sub-section (1) have been duly complied with, he shall amend the entry relating to the firm in the Register of Firms in accordance with the statement, and shall file it alongwith the statement, relating to the firm filed under section 59.

Comments

When there is an alteration in the firm name or in the location of principal place of business of a registered firm, the same kind of formalities as have been mentioned in sec. 58 are to be observed. When the Registrar is satisfied that the necessary formalities have been complied with, he shall amend the entry in the Register of Firms.

61. Nothing of closing and opening of branches.—When a registered firm discontinues business at any place or begins to carry on business at any place, such place not being its principal place of business, any partner or agent of the firm may send intimation thereof to the Registrar, who shall make a note of such intimation in the entry relating to the firm in the Register of Firms, and shall file the intimation alongwith the statement relating to the firm filed under section 59.

Comments

When there is closing or opening of branches of an already existing firm, any partner or agent of the firm may send intimation thereof to the Registrar, who shall then make necessary changes in the Register of Firms.

62. Nothing of changes in names and addresses of partners.—When any partner in a registered firm alters his name or permanent address, an intimation of the alteration may be sent by any partner or agent of the firm to the Registrar, who shall deal with it in the manner provided in section 61.

Comments

In case there is any change in the name or permanent address of any partner of a registered firm, an intimation of the alteration

may be sent by any partner or agent of the firm to the Registrar. The Registrar shall then make necessary changes in the Register of Firms.

63. Recording of changes in and dissolution of a firm.—(1) When a change occurs in the constitution of a registered firm, any incoming, continuing or outgoing partner when a registered firm is dissolved, any person who was a partner immediately before the dissolution, or the agent of any such partner or person specially authorised in this behalf, may give notice to the Registrar of such change or dissolution, specifying the date thereof; and the Registrar shall make a record of the notice in the entry relating to the notice in the Register of Firms and shall file the notice alongwith the statement relating to the firm filed under section 59.

Recording of withdrawal of a minor.—(2) When a minor who has been admitted to the benefits of partnership in a firm attains majority and elects to become or not to become a partner, and the firm is then a registered firm, he, or his agent specially authorised in this behalf, may give notice to the Registrar that he has or has not become a partner, and the Registrar shall deal with the notice in the manner provided in sub-section (1).

Comments

Recording the changes in the constitution of a firm and the dissolution of a firm.— Changes in the constiution of the firm may occur either on the introduction of a partner[2] to the firm, or when a partner cases to be a partner by retirement[3], expulsion[4], insolvency[5] or death.[6] No fresh registration is needed on the death of a partner or otherwise in case of change in the constitution of the firm, but it is sufficient to notify the Registrar, who can make a note in the relevant register.[7] When change in the constitution of the firm occurs or the firm is dissolved notice thereof may be given to the Registrar by the incoming or outgoing partner, or by any of the continuing partners or by a duly authorised agent of any of the abovestated persons. Like registration of a firm the notice of the change in the constitution of the firm or its dissolution is not compulsory. However, in the case of retirement or expulsion of a partner or on the dissolution of a firm, public notice of such retirement[8], expulsion[9] or dissolution[10] has to be given, otherwise the liability of the partners for the act of each other continues to be the same as before. In the case of a registered

2. S. 31.
3. S. 32.
4. S. 33.
5. S. 34.
6. S. 35.
7. Durgadas Janak Raj v. Preete Shah Sant Ram, A. I. R. 1959 Punj. 530; Kesrimal v. Dalichand, A. I. R. 1959 Raj. 140.
8. S. 32 (3).
9. S. 33 (2).
10. S. 45.

firm public notice includes notice to the Registrar under sec. 63.[11]

When a minor has been admitted to the benefits of partnership such a minor on attaining the age of majority has to give a public notice of his election as to whether he becomes a partner or not.[12] Public notice in the case of a registered firm also includes notice to the Registrar.[13]

On receipt of the notice as stated above the Registrar shall make a record of the notice in the entry relating to the firm in the Register of Firm, and shall file the notice along with the statement relating to the firms filed under sec. 59.

64. Rectification of mistakes.—(1) The Registrar shall have power at all times to rectify any mistake in order or bring the entry in the Register of Firms relating to any firm into conformity with the documents relating to that firm filed under this Chapter.

(2) On application made by all the parties who have signed any document relating to a firm filed under this Chapter the Registrar may rectify any mistake in such document or in the record or note thereof made in the Register of Firms.

Comments

Under sub-sec. (1) the Registrar has been empowered to correct any mistakes which may have been there in the Register of Firms order to bring the Register relating to any firm in conformity with the documents filed under this Chapter.

Sometimes there may be some mistakes in the documents filed with Registrar or in the records of the Registrar. Sub-sec. (2) provides that on application made by all the parties who have signed documents relating to a firm, the Registrar may rectify any mistakes in such documents or in the record or note thereof made in the Register of Firms.

65. Amendment of Register by order of Court.—A Court deciding any matter relating to a registered firm may direct that the registrar shall make any amendment in the entry in the Register of Firms relating to such firm which is consequential upon its decision; and the Registrar shall amend the entry accordingly.

66. Inspection of Register and filed documents.—(1) The Register of Firms shall be open to inspection by any person on payment of such fee as may be prescribed.

(2) All statements, notices and intimations filed under this Chapter shall be open to inspection, subject to such conditions and on payment of such fee as may be prescribed.

11. S. 172 (a).
12. Sec. 30 (5).
13. Ss. 72 (a) and 63 (2).

67. Grant of copies.—The Registrar shall on application furnish to any person, on payment of such fee as may be prescribed, a copy, certified under his hand, of any entry or portion thereof in the Register of Firms.

68. Rules of evidence.—(1) Any statement, intimation or notice rcorded or noted in the Register of Firms shall, as against any person by whom or on whose behalf such statement, intimation or notice was signed, be conclusive proof of any fact therein stated.

(2) A certified copy of an entry relating to a firm in the Register of Firms may be produced in proof of the fact of the registration of such firm, and of the contents of any statement, intimation or notice recorded or noted therein.

Comments

Sub-sec. (1) lays down the rule that the documents filed with the Registrar, on the basis of which he prepares his record and Register of Firms, shall be conclusive proof of the facts contained therein as against any person by whom or on whose behalf such document was signed. The facts in the documents are conclusive proof against the parties signing them and not against the third parties. Therefore, if a person's name is there in there Register of Firms as a partner, he would be liable as a partner and he will not be allowed to say that now he has ceased to be a partner. The object of the provision is to compel the partners to have the changes in the constitution of the firm notified to the Registrar. When a partner retires or is expelled or the firm is dissolved, the partners continue to be liable for the act of each other unless a public notice of such retirement[14] or expulsion[15] or dissolution[16] of the firm is given. Public notice in the case of a registered firm includes notice to the Registrar of Firms[17] for for his making the necessary changes. The third party, however, is allowed to prove against the facts noted with the Registrar. For example, a third party may prove that a person is or has been a partner in a firm although his name does not appear in the Register of Firms.[18]

Sub-sec. (2) provides that a certified copy of an entry relating to a firm in the Register of Firms may be produced to prove either the registration of the firm or some other statements etc. filed with the Registrar.

69. Effect of non-registration.—(1) No suit to enforce a right arising from a contract or conferred by this Act shall be instituted in any Court by or on behalf of any person suing as a

14. S. 32 (3).
15. S. 33 (2).
16. S. 45.
17. S. 72.
18. Snow White Food Products Pvt. Ltd. v. Sohanlal Bagla, A. I. R. 1964 Cal. 209.

partner in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm.

(2) No suit to enfore a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm.

(3) The provisions of sub-sections (1) and (2) shall apply also to a claim of set-off or other proceedings to enforce a right arising from a contract, but shall not affect—

(a) the enforcement of any right to sue for the dissolution of a firm or for accounts of a dissolved firm or any right or power to realise the property of a dissolved firm, or

(b) the powers of an official assignee, receiver or Co urt under the Presidency-towns Insolvency Act, 1919, or the Provincial Insovency Act, 1920, to realise the property of an insolvent partner.

(4) This section shall not apply—

(a) to firms or to partners in firms which have no place of business in the territories to which this Act extends, or whose places of business in the said territories are situated in areas to which, by notification under section 56, this Chapter does not apply, or

(b) to any suit or claim of set-off not exceeding one hundred rupees in value which, in the Presidency towns, is not of a kind specified in section 19 of the Presidency Small Cause Courts Acts, 1882, or, outside the Presidency-towns, is not of a kind specified in the Second Schedule to the Provincial Small Cause Courts Act, 1887, or to any proceeding in execution or other proceeding incidental to or arising from any such suit or claim.

Comments

The Partnerfhip Act neither makes the registration of a firm compulsory nor does it impose any penalties for non-registration as are imposed in England under the Registration of Business Names Act, 1916. However, it provides certain disabilities for an unregistered firm and the partners of such a firm or the partners whose names have not been shown as registered partners even though the firm is registered. Sub-section (1) provides that no suit can be instituted to enforce rights arising from a contract or conferred by the Partnership Act by any partner against his co-

partners or against the firm. Similarly, according to sub section (2) no suit can be instituted to enforce any right arising from a contract by an unregistered firm against any third party. Sub-section (3) also provides that the disability mentioned in sub-sections (1) and (2) shall also apply to a claim of set-off or other proceeding to enforce a right arising from a contract. The idea behind making these provisions is that in their own interest the partners of a firm may get the firm registered and thereby the interests of the third parties with whom the firm may be dealing may be protected. The procedure for registration is very simple and the disabilities being too compelling that generally the partners would like to get the firm registered at one time or the other.

Effects of Non-Registration

1. Suits between partners and the firm

According to sub-section (1) no suit to enforce a right arising from a contract or conferred by the Partnership Act can be instituted in any Court unless the following two requirements are satisfied :—

(i) the partnership firm is registered ; and

(ii) The partner filing the suit has been shown in the Register of Firms as a partner of the firm. This provision bars a suit between partners or between partners and the firm if the firm is unregistered. Even if the firm is registered only such partners can sue whose names appear in the Register of Firms. Therefore, if some partners join after the firm with certain other partners has already been registered, unless the newly introduced partners are also shown in the Register of Firms, they suffer from the disability because only the registered partners can get benefit of the decree.[19]

The disabilities mentioned above are in respect of enforcing a contract or enforcing rights conferred by this Act. In case the basis of the claim of the plaintiff is an agreement creating the right independently of partnership business between him and the defendant that will not bar an action in the case even if the firm is unregistered. For example, when one partner is a creditor of another partner or of the partnership business, he may be allowed to bring an action for the same.[20]

In case the firm is unregistered and the partners are interested in enforcing their rights against their fellow partners or against the firm, the way out is to get the firm registered before the suit filed.

19. Chiman Lal v. Firm New Bndia Traders, A. I. R. 1962 Patna 25.
20. Inder Singh Sham Singh v. Brahma Deo Prasad, 1958, Bihar L. J. R. 608.

2. Suits between the firm and the third parties

According to sub-section (2) if the firm is unregistered, no suit to enforce a right arising from a contract can be instituted by the firm or its partners against a third party. Sub-section (2) also requires two conditions to be fulfilled before a suit can be instituted against a third party :—

(i) the firm must be a registered firm ; and

(ii) the persons suing must be shown in the Register of Firms as partners of the firm.

The disability is there for an unregistered firm and its partners if any contract is to be enforced against a third party. If the basis of the claim is wrongful detention of property and the action is under the Law of Torts and not for the breach of contract, the suit is maintainable and is not covered by the disability mentioned in Section 69 (2).[21] Similarly, a suit for recovery of price of goods obtained by fraud ls maintainable because the action does not arise out of contract.[22]

As is obvious from sub-sec. (2), the disability is against an unregistered firm or its partners but it is not against the third party. Therefore a third party is not barred from bringing an action against an unregistered firm.

Claim of set-off or other proceeding

According to sub-section (3) the disabilities mentioned above also apply to a claim of set-off or other proceeding to enforce a right arising from a contract. For example, if a third party brings an action against the firm to recover some money, the firm cannot say that the third party also owes some money to the firm and, therefore, the claim of third party should be adjusted against the claim of the flrm, which means the unregistered firm cannot claim a set-off.

The disabilites of sub-section (1) and (2) shall also apply to "*other proceedings*" to enforce a right arising from a Contract. In *Messers. Gap ulal Gordhandas* v. *Messers, Chunilal Shyam Lal*[23] it has been held that if an unregistered firm brings an action for the reduction of a rent against its landlord, such a suit to enforce a right arising out of a contract of tenancy is not maintainable because the suit falls under the disability mentioned in sub-section (3).

In *Jagdish Chand Gupta* v. *Kajaria Traders (India) Ltd.*,[24] the question arose whether the term "other proceedings' cover

21. Governor in Council v. Firm Bansidhar Prem Sukh, 1959, All. W. R. (H. C.) 18.
22. Shankaraling Nadar v. Ouseph Chacko, 1963 Ker. L. J. 387.
23. A. I. R. 1961 Raj. 286.
24. A. I. R. 1964 S. C. 1882.

arbitration proceedings also. The Supreme Court answered the question in the affirmative. In that case an agreement between two partners was that in case of any dispute between them the matter will be referred to arbitration. In accordance with the agreement one of partners appointed an arbitrator to which the other did not agree. An action was brought to enforce the agreement and the appointment of the arbitrator. The disagreeing partner contended that such a right of the other partner was not enforceable as the firm was unregistered. The Supreme Court held that the suit was not maintainable.

Exceptions

The disabilities discussed above are not applicable to the unregistered firm in the following exceptional cases :

1. Sec. 44 mentions certain circumstances under which on the suit of a partner the court may dissolve a firm. Sec. 69 (3) permits a suit even by the partners of an unregistered firm to sue for the dissolution of a firm or for the accounts of a dissolved firm. In case the firm has already been dissolved the partners of the unregistered firm can realise the property of the dissolved firm. This right includes enforcing a claim arising from contract prior to dissolution. The disability for non-registration works only during the subsistence of the partnership. After the firm is dissolved it is not the disability mentioned in sub-sections (1) and (2) of sec. 69 which governs the position. but it is the provisions of sec. 69 (3) which operate giving the partners power to "realise the property of the dissolved firm." In *Biharilal Shyamsunder* v. *Union of India*[25], the plaintiffs claimed damages for non-delivery of a bale of cloth despatched from Ahmadabad to Muzzafarpur through railway. The said action was brought after the dissolution of the firm whlch was unregistered. It was held by the Patna High Court that the partners of the dissolved firm are entitled to bring the suit for compensation from the railway for non-delivery of the consignment of cloth.

Any right or power to realise the property of the dissolved firm mentioned in sec. 69 (3) (a) not only means a right against a third party but it also includes a right against the partners of the dissolved firm as well.[26] In *Basantlal* v. *Chiranjilal*,[27] one partner of an unregistered firm sued the other partner after the dissolution for recovery of money in respect of accounts between them, it was held that such an action was maintainable after the dissolution of the firm.

25. A. I. R. 1960 Pat. 397; Baba Commercial Syndicate v. Channamasetti, A. I. R. 1968 A. P. 378 : Bhagwanji Morarji v. Alembic Chemical Works A. I. R. 1943 Bom. 385.

26. Basantlal v. Chiranjilal, A. I. R. 1968 Pat. 96, Sheo Dutt v. Pushi Ram, A. I. R. 1947 All. 229.

27. A. I. R. 1968 Pat. 96.

In *Navinchandra* v. *Moolchand*[28] it has been held that even a a suit for damages for misconduct brought by one partner against another after the dissolution of an unregistered firm would be permitted because the amount so realised should be divided between the partners and that is, therefore, the property of the dissolved firm.

2. Sec. 69 (3) (b) mentions another exception when an action could be brought on behalf of a partner against an unregistered firm. It provides that an official assignee, receiver, or Court have a power to bring an action to realise the property of the insolvent partner.

3. Sec. 69 (4) (a) exempts such firms from the operation of the provisions of this section whose place of business is not in India or whose place of business is in such areas, where because of notification under sec. 56, this Chapter does not apply. It has already been noted above that section 56 provides that the Government of any State may, by notification in the Official Gazette, direct that the provisions of this Chapter shall not apply to that State or to any part thereof specified in the notification.

4. Sec. 69 (4) (b) provides an exception for firms having small claims. If the value of the suit does not exceed Rs. 100/- an unregistered firm or its partners can bring an action against the third party.

Once the registration is made it would continue to be valid in the eyes of law until the same was canelled. If a firm was registered at a place in Pakistan before the partition of the country the registration would continue to be valid and, therefore, a suit in India after partition would be maintainable.[28] Similarly, there is no need of fresh registration on the death of a partner,[29] or when there is otherwise any change in the constitution of the firm.[30] In such cases it is sufficient to notify the Registrar about the change so that he could note the same in the relevant register.

Registration subsequent to the filing of the suit

If the firm is not registered "*no suit shall be instituted*" either between the partners *inter se* or against any third party In case the firm is unregistered such a suit shall be liable to dismissed. There is on specific provision in the Act for the dismissal of the suit *suo moto*. A plea for the dismissal of the suit on the ground of non-registration has to be made.[31] If the plaintiff admits that his suit is on behalf of an unregistered partnership, the Court must immediately dismiss the suit in view of the express and mandatory provisions of sec. 69.[32]

28. A. I. R. 1966 Bom. 111.
29 Bombay Cotton Export Import Co. v. Bharat Suryodhaya Mill Co. A. I. R. 1959 Bom. 307 ; Girdharmal v. Dev Raj A. I. R. 1963 S. C. 1587.
30. Durgadas Janak Raj v. Preete Shah Sant Ram, A. I. R. 1959 Punj-530 ; Kesrimal v. Dalichand, A. I. R. 1959 Raj. 140.
31. Dhanpal Patni v. Union of India, 1960 M. P. L. J. (Notes) 22.
32. Shriram v. Gourishankar, A. I. R. 1961 Bom. 136, at p. 141.

If the firm is not registered on the date of the filing of the suit the suit is liable to be dismissed. In view of the mandatory provisions of sec. 69 making registration a condition precedent to the institution of the suit, registration of the firm subsequent to the institution of the suit cannot cure the defeet. In *M/s. Jammu Cold Storage* v. *M/s. Khairati Lal and Sons*,[33] M/s. Kharati Lal and Sons instituted a suit to recover a sum of Rs. 1,000/- from M/s. Cold Storage and General Mills Ltd. on 15.4.1959. The firm was not registered on that day but it was got registered subsequently, on 30.5.1959. It was held by the J. &. K. High Court that since the firm was not registered on the date of the institution of the suit, the suit cannot proceed further and it must be dismissed.[34] When a suit has been dismissed on grounds of non-registration, a fresh suit after the registration of the firm is maintainable. The same is not barred as *res judicata* as the dismissal of a suit because of non-registration is not a decision of the case on its merits.[35]

70. Penalty for furnishing false particulars.—Any person who signs any statement, amending statement, notice or intimation under this Chapter containing any particular which he knows to be false or does not believe to be true, or containing particulars which he knows to be incomplete or does not believe to be complete, shall be punishable with imprisonment which may extend to three months, or with fine, or with both.

Comments

Information given to the Registrar through various documents filed with him in connection with the registration of a firm serves the purpose of making the third parties conversant with the firm and the partners. So that third parties dealing with the firm are not misled correct and complete information should be available with the Registrar. This section imposes penalty for making any false declaration in any document filed with the Registrar.

71. Power to make rules.—(1) The State Government may make rules prescribing the fees which shall accompany documents sent to the Registrar of Firms or which shall be payable for the inspection of documents in the custody of the Registrar of Firms, or for copies from the Register of Firms :

Provided that such fees shall not exceed the maximum fees specified in Schedule I.

(2) the "State Goverment" may also make rules—

(a) prescribing the form of statement submitted under section 38, and of the verificatlon thereof ;

33. A. I. R. 1960 J. & K. 101.

34. Also see Dwijendra Nath Singh v. Govinda Chandra A. I. R. 1953 Cal. 497 ; Prithvi Singh v. Hasan Ali, 1951 Bom. 6, for a similar view.

35. Sri Baba Commercial Syndicate v. Channamasetti, A. I. R. 1968 A. P. 378 ; Shanmugha v. Rathina A. I. R. 1948 Mad. 187.

(b) requiring statements, intimations and notice under sections 60, 61, 62, and 63, to be in prescribed form and prescribing the form thereof ;

(c) prescribing the form of the Register of Firms and the mode in which entries relating to firm are to be made therein and the mode in which such entries are to be amended or notes made therein ;

(d) regulating the procedure of the Registrar when disputes arise ;

(e) regulating the filing of documents received by the Registrar ;

(f) prescribing conditions for the inspection of original documents ;

(g) regulating the grant of copis ;

(h) regulating the elimination of registers and documents ;

(i) providing for the maintenance and form of an Index to the Register of Firms ; and

(j) generally, to carry out the purposes of this Chapter ;

(3) All rules made under this section shall be subject to the condition of previous publication.

CHAPTER VIII

SUPPLEMENTAL

72. Mode of giving public notice.—A public notice under this Act is given—

(a) where it relates to the retirement or expulsion of a partner from a registered firm, or to the dissolution of a registered firm, or to the election to become or not to become a partner in a registered firm by a person attaining majority who was admitted as a minor to the benefits of partnership, by notice to the Registrar of Firms under section 63, and by publication in the Official Gazette and in at least one vernacular newspapes circulating in the district where the firm to which it relates has its place or principal place of business, and

(b) in any other case, by publication in the Official Gazette and in at least one vernacular newspaper circulating in the district where the firm to which it relates has its place or principal place of business.

73. [Repealed]. *Repealed by Act I of 1938.*

74. Savings.—Nothing in this Act or any repeal effected thereby, shall affect or be deemed to affect—

(a) any right, title, interest, obligation liability already acquired, accrued, incurred before the commencement of this Act, or

(b) any legal proceeding or remedy in respect of any such right, title, interest, obligation or liability, or anything done or suffered before the commencement of this Act, or

(c) anthing done or suffered before the commencement of this Act, or

(d) any enactment relating to partnership not expressly repealed by this Act, or

(e) any rule of insolvency relating to partnership, or

(f) any rule of law not inconsistent with this Act.

SCHEDULE I

MAXIMUM FEES

[*See* sub-section [1] of section 71]

Document or act in respect of which the fee is payable	Maximum fee
Statement under section 58	Three rupees
Statement under section 60	One rupee
Intimation under section 61	One rupee
Intimation under section 62	One rupee
Notice under section 63	One rupee
Application under section 64	One rupee
Inspection of the Register of Firms under sub-section [1] of section 66	Eight annas for inspecting one volume of the Register
Inspection of documents relating to a firm under sub-section [2] of section 66	Eight annans for the inspection of all documents relating to one firm
Copies from the Register of Firms	Four annas for each hundred words or part thereof

SCHEDULE II :—[*Enactment Repealed*]. ***Rep. by the Repealing Act, 1938 (1 of 1938), S. 2 and Sch.***

Subject Index

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